

THE PROVISION OF ARMS AND ‘NON-LETHAL’ ASSISTANCE TO GOVERNMENTAL AND OPPOSITION FORCES

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I INTRODUCTION

The Cold War was replete with incidents of support by both the United States (‘US’) and Union of Soviet Socialist Republics (‘USSR’) for both governmental and opposition forces in other states. Interventions made to prop up a particular governmental regime on ideological or political grounds were very often legally justified on the basis of an invitation to intervene by the government concerned, a justification which in and of itself causes little controversy from the perspective of international law.¹ Instead, the controversy caused by these interventions was a result not of the use of this as a legal justification per se, but instead the circumstances in which it was invoked. A cursory examination of the USSR’s intervention in Hungary in 1956 and that of the US in Grenada in 1983 provide striking examples of the Cold War superpower rivals employing this as a justification for intervention in somewhat disingenuous circumstances.²

However, it became clear that during this period of ideological conflict support was also being provided to opposition forces in their effort to topple a particular regime. Yet these interventions were very often conducted by the US

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1 This is due to the absence of any perceived violation of the sovereignty of the state concerned. See below Part II(A). See also Louise Doswald-Beck, ‘The Legal Validity of Military Intervention by Invitation of the Government’ (1985) 56 *British Yearbook of International Law* 189.

2 The intervention in Hungary to prevent a move away from one-party rule was justified by the USSR as a response both to a request from a former Prime Minister and to the existence and actions of a reactionary underground movement. In the case of the intervention in Grenada the invitation to the US to intervene supposedly came from the Governor-General, a post without executive powers to make such a request. The US ultimately overthrew the old government and installed a new one. The United Nations General Assembly (‘UNGA’) condemned both interventions while the United Nations Security Council (‘UNSC’) condemnation was only avoided by the use of the veto by the respective superpower. See ‘The Hungarian Question’ [1956] *Yearbook of the United Nations* 67 and ‘Grenada Situation’ [1983] *Yearbook of the United Nations* 211 respectively. For the underlying doctrines, albeit not of a legal nature, used in support of these interventions, see W Michael Reisman, ‘Old Wine in New Bottles: The Regan and Brezhnev Doctrines in Contemporary International Law and Practice’ (1988) 13 *Yale Journal of International Law* 171.

and the USSR using indirect proxy means. Indeed, states in general very rarely directly intervened in support of such opposition forces using their own armed forces.³ Instead, support of an indirect nature was more commonly provided, which included not only the provision of political and financial aid but also training, equipment and arms.⁴ However, although such support was provided during this era to both opposition and governmental forces, the support provided to opposition forces was mostly provided covertly, arguably in implicit recognition of the illegality of providing support to such groups and their aims.⁵ For example, the US indirectly and covertly intervened in Laos between 1958–60 in support of opposition forces in an attempt to remove a regime which it viewed as ideologically unsound.⁶ When a government came to power in 1961 which was seen as more ideologically favourable, it then openly bombed the then opposition forces.⁷ US support, and in particular the Central Intelligence Agency ('CIA'), for the Contra forces in Nicaragua in the early 1980s provides another example, which the US subsequently legally justified on the basis of collective self-defence as opposed to an independent right to provide such support.⁸

More recently, the euphemistically termed 'Arab Spring' has brought to the fore the issue of the provision of both arms and what has come to be known as 'non-lethal' assistance to both government and opposition forces,⁹ and has also witnessed more open support for the forces of opposition groups. Given the speed and unity with which the United Nations Security Council ('UNSC') initially acted in Libya in 2011, the central question in that conflict concerned whether the provision of arms and such assistance could plausibly come within the mandate of the UNSC to use 'all necessary means' in the context of protecting civilians.¹⁰ In the absence of such an authorising resolution in connection with the conflict in Syria, however, the question of whether the provision of arms and non-lethal assistance is lawful is one that falls to be answered more directly under the principle of non-intervention and the prohibition of the use of force.¹¹

3 Christine Gray, *International Law and the Use of Force* (Oxford University Press, 3rd ed, 2008) 105.

4 Ibid 105–7.

5 For more on the illegality of such assistance, see below Part II.

6 A Mark Weisburd, *Use of Force: The Practice of States since World War II* (Pennsylvania State University Press, 1997) 179–82; Gray, above n 3.

7 Weisburd, above n 6, 181; Gray, above n 3.

8 See generally *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICJ Rep 14 ('*Nicaragua*').

9 However, assistance to opposition forces was occasionally termed 'non-lethal' or 'humanitarian' by the superpowers during the Cold War: see, eg, Keesing's Worldwide, 'Jun 1986 – PRK Proposals for Talks – CGDK Counter-proposals' [1986] *Keesing's Contemporary Archives* 34426; Keesing's Worldwide, 'Jun 1987 – Government Changes Foreign Relations Developments in Guerrilla War Elections' [1987] *Keesing's Record of World Events* 35174. For more on the meaning of 'non-lethal' assistance, see below Parts II–III.

10 See below Parts III(A), IV(A). See also Christian Henderson, 'International Measures for the Protection of Civilians in Libya and Côte d'Ivoire' (2011) 60 *International and Comparative Law Quarterly* 767, 769–72.

11 See below Parts III(B), IV(B)–(F).

While issues connected with the Arab Spring have been enthusiastically examined in the international legal literature,¹² this article seeks to address the specific question of the lawfulness of providing arms and ‘non-lethal’ assistance to both governmental and opposition forces within and outside the context of a civil war. This is an issue that has not been fully addressed in the legal literature, either in connection with the recent events of the Arab Spring or those of a more historical nature. Yet, the continuance of the Arab Spring provides a suitable backdrop for an exploration and assessment of the legality of such measures. Furthermore, the outcome of this assessment will offer some reflection upon the contemporary contours of the fundamental international legal principles of non-intervention and non-use of force. Given this overarching aim the article is structured in the following manner.

Part II sets out and examines the principle of non-intervention and the prohibition of the use of force and how these apply to the specific issue addressed in this article, primarily through an analysis of the International Court of Justice’s (‘ICJ’) exposition of their relationship in the landmark *Nicaragua* case of 1986 and the United Nations General Assembly (‘UNGA’) resolutions drawn upon therein. In light of the examination of these principles in this context, Part III discusses the Libyan and Syrian crises in the context of the provision of such support. In the absence of a distinct legal right to provide arms and such assistance, Part IV addresses whether there are any possible legal grounds upon which it might be provided, including supporting the right to self-determination, counter-intervention, and unilateral humanitarian intervention with a particular focus on the Arab Spring conflicts. Finally, Part V offers some conclusions of a broader nature on the contemporary position under international law, particularly in light of the emergence of the ‘Responsibility to Protect’ (‘R2P’) concept, of the provision of arms and non-lethal assistance to both governmental and opposition forces.

II THE PRINCIPLES OF NON-INTERVENTION AND NON-USE OF FORCE IN THE CONTEXT OF THE PROVISION OF ARMS AND NON-LETHAL ASSISTANCE

A The Existence and Form of the Principle of Non-intervention

In its most rudimentary form, the principle of non-intervention ‘involves the right of every sovereign State to conduct its affairs without outside

12 See, eg, Carlo Panara and Gary Wilson (eds), *The Arab Spring: New Patterns for Democracy and International Law* (Martinus Nijhoff, 2013); Henderson, ‘International Measures for the Protection of Civilians’, above n 10; Olivier Corten and Vaïos Koutroulis, ‘The Illegality of Military Support to Rebels in the Libyan War: Aspects of *Jus contra Bellum* and *Jus in Bello*’ (2013) 18 *Journal of Conflict & Security Law* 59; Julian M Lehmann, ‘All Necessary Means to Protect Civilians: What the Intervention in Libya Says About the Relationship between the *Jus in Bello* and *Jus ad Bellum*’ (2012) 17 *Journal of Conflict & Security Law* 117; Mehrdad Payandeh, ‘The United Nations, Military Intervention, and Regime Change in Libya’ (2012) 52 *Virginia Journal of International Law* 355.

interference.¹³ It is true that the *Charter of the United Nations* ('UN Charter') 'does not explicitly set out a general obligation of non-intervention.'¹⁴ However, the principle is nonetheless one that has been generally recognised as being grounded in customary international law.¹⁵ Of course, for a customary legal norm to exist a practice exhibiting the existence of the norm and *opinio juris* expressing allegiance to it as a legal principle are formally required elements.¹⁶ As noted above, incidences of the principle of non-intervention being contravened in practice are not uncommon. Yet, for the development of a customary norm perfect compliance is not necessarily required,¹⁷ and it is also not immediately apparent whether the two elements have to exist or be discernible in equal measure or – following the methodological approach of the ICJ in the 1986 *Nicaragua* case – whether the strong existence of one negates the necessity of discerning the other to the same degree, or even perhaps any degree.¹⁸ In this respect, despite transgressions of the norm, expressions of *opinio juris* that the principle exists have been consistently and clearly professed by states. For example, states have repeatedly reaffirmed that '[n]o State has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State.'¹⁹ As such, while breaches have taken place – and continue to do so – the formality, generality and consistency with which the broad and non-specific principle of non-intervention has been expressed leads

13 *Nicaragua* [1986] ICJ Rep 14, 106 [202].

14 Vaughan Lowe, 'The Principle of Non-intervention: Use of Force' in Colin Warbrick and Vaughan Lowe (eds), *The United Nations and the Principles of International Law: Essays in Memory of Michael Akehurst* (Routledge, 1994) 66, 68. While art 2(7) of the *UN Charter* states that '[n]othing contained in the present Charter shall authorize the *United Nations* to intervene in matters which are essentially within the domestic jurisdiction of any state' (emphasis added), this limitation is not applicable to individual Member States themselves.

15 *Nicaragua* [1986] ICJ Rep 14, 126 [246]; Malcolm N Shaw, *International Law* (Cambridge University Press, 6th ed, 2008) 1147.

16 Article 38(1)(b) of the *Statute of the International Court of Justice* defines customary international law as 'evidence of a general practice accepted as law.' See also *North Sea Continental Shelf (Federal Republic of Germany v Denmark) (Judgment)* [1969] ICJ Rep 3, 43 [74].

17 *Nicaragua* [1986] ICJ Rep 14, 98 [186].

18 In the *Nicaragua* case, the ICJ found that expressions of *opinio juris* regarding the existence of the prohibition of the use of force had been made so clearly in certain UNGA resolutions that it did not feel the need to provide an examination of state practice to support this claim: see *ibid* 99 [188]. On the other hand, Michael Glennon has claimed that physical state practice is sufficient to indicate that the prohibition of the use of force has fallen into desuetude, despite states expressing their adherence to it: see generally Michael J Glennon, 'How International Rules Die' (2005) 93 *Georgetown Law Journal* 939.

19 See, eg, *Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty*, GA Res 2131 (XX), UN GAOR, 20th sess, 1408th plen mtg, Agenda Item 107, UN Doc A/RES/20/2131 (21 December 1965) para 1 ('*Declaration on the Inadmissibility of Intervention*'); *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations*, GA Res 2625 (XXV), UN GAOR, 25th sess, 1883rd plen mtg, Agenda Item 85, UN Doc A/Res/25/2625 (24 October 1970) annex ('*Declaration on Principles of International Law Concerning Friendly Relations*'); *Charter of the Organization of American States*, signed 30 April 1948, 119 UNTS 3 (entered into force 13 December 1951) art 19 ('*Charter of the Organization of American States*').

one to conclude that it is a principle of international law the existence of which states as a whole wish to proclaim.

B Intervention in Support of Governmental Forces

While the principle of non-intervention is framed here in the context of state sovereignty, this is in some ways misleading as it is in actual fact *governmental* as opposed to *state* sovereignty that is really in issue. In other words, states are permitted per se to intervene in the affairs of another state, providing it is at the invitation or with the consent of the government of the state concerned.²⁰ In this sense, military assistance may be ‘rendered by one state to another at the latter’s request and with its consent, which may be given ad hoc or in advance by treaty.’²¹ Consequently, states are generally considered free to – and regularly do – provide various forms of military assistance, including arms, to the government of another state and its armed forces.²²

The majority of arms are transferred between states through the arms trade.²³ While this trade has traditionally been relatively unregulated, UN Member States adopted the text of an historic treaty at the UNGA in April 2013 which sought to add some regulation to the trade in conventional arms.²⁴ In particular, *The Arms Trade Treaty* prohibits states from exporting conventional weapons in violation of arms embargoes, or weapons that would be used for acts of genocide, crimes against humanity, war crimes or terrorism.²⁵ Furthermore, it requires states to prevent conventional weapons from reaching the black market.²⁶ Thus, while at the time of writing, the *Treaty* has only been signed by 79 states and ratified by two and so is not as yet in force, when operational it will provide an overarching governing framework to the trade in arms between states which remains a lawful – indeed thriving – trade.

20 *Nicaragua* [1986] ICJ Rep 14, 126 [246]; Shaw, above n 15, 1151. While it may be argued that this rule exists due to the government being a legitimate representative of the people of the state concerned, it applies as much to autocratic regimes as it does to those of a democratic nature. However, see below Part IV(D) for the potential exception to the intervention by invitation rule in the context of civil wars. On intervention by invitation, see generally Doswald-Beck, above n 1. On intervention by invitation in the civil war context, see generally Eliav Lieblich, *International Law and Civil Wars: Intervention and Consent* (Routledge, 2013).

21 Sir Robert Jennings and Sir Arthur Watts (eds), *Oppenheim’s International Law* (Longman, 9th ed, 1996) vol 1, 435.

22 The provision of such assistance is not, however, limited to recognised states. Indeed, the US and other states sell arms to Taiwan which is only recognised by 23 states (none of whom are those which provide it with arms). See Christian Henderson, ‘Contested States and the Rights and Obligations of the *Jus ad Bellum*’ (2013) 21 *Cardozo Journal of International and Comparative Law* 367, 405.

23 See generally Zeray Yihdego, *The Arms Trade and International Law* (Hart Publishing, 2007).

24 Draft Decision Submitted by the President of the Final Conference, UN GAOR, UN Doc A/CONF.217/2013/L.3 (27 March 2013) annex (*‘The Arms Trade Treaty’*). It was adopted 154–3–23. Syria, Iran and North Korea, which ultimately voted against its adoption, had previously prevented it from being adopted by consensus.

25 *Ibid* art 6.

26 *Ibid* art 8.

C Intervention in Support of Opposition Forces: The Element of Coercion and the Use of Force

In contrast to the right of governments to invite or consent to intervention, and as the ICJ has continuously held, there is no 'right for States to intervene, directly or indirectly, with or without armed force, *in support of an internal opposition* in another State',²⁷ as such an intervention would be considered a violation of the sovereignty of the state concerned. In this respect, the principle of non-intervention

would certainly lose its effectiveness as a principle of law if intervention were to be justified by a mere request for assistance made by an opposition group in another State. ... Indeed, it is difficult to see what would remain of the principle of non-intervention in international law if intervention, which is already allowable at the request of the government of a State, were also to be allowed at the request of the opposition. This would permit any State to intervene at any moment in the internal affairs of another State, whether at the request of the government or at the request of its opposition. Such a situation does not in the Court's view correspond to the present state of international law.²⁸

However, an important element of the Court's exposition of the principle of non-intervention in 1986 is that a transgression occurs only once the act of intervention takes on a form of 'coercion' and is one that bears 'on matters in which each State is permitted, by the principle of State sovereignty, to decide freely', for example a state's political, economic, social and cultural choices.²⁹ Thus while states, for example, regularly comment upon situations that are occurring in another state, the principle of non-intervention only becomes engaged once the intervening state seeks to coerce that state into making certain choices or taking – or being subjected to – certain actions. Although '[i]t is the intention, rather than the means adopted, which may qualify a State's action as unlawful intervention',³⁰ it nonetheless stands to reason that, as the ICJ noted, '[t]he element of coercion, which defines, and indeed forms the very essence of, prohibited intervention, is particularly obvious in the case of an intervention which *uses force*'.³¹ Interventions involving such physical coercion, which constitutes a more specific form of intervention, are something that is independently prohibited in article 2(4) of the *UN Charter*.³² Furthermore, the prohibition of the threat or use of force is generally recognised as having special weight within the international community, with many categorising it as a norm

27 *Nicaragua* [1986] ICJ Rep 14, 108 [206] (emphasis added); *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda) (Judgment)* [2005] ICJ Rep 168, 227 [164] ('*Armed Activities*').

28 *Nicaragua* [1986] ICJ Rep 14, 126 [246].

29 *Ibid* 108 [205]; *Declaration on the Inadmissibility of Intervention*, UN Doc A/RES/20/2131 paras 1–2, 5; *Declaration on Principles of International Law Concerning Friendly Relations*, UN Doc A/Res/25/2625 annex para 1 principle 3.

30 Lowe, above n 14, 67.

31 *Nicaragua* [1986] ICJ Rep 14, 108 [205] (emphasis added). See generally *ibid*.

32 This provision states that '[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.'

of *jus cogens*,³³ and others terming the rule's treaty presence a 'cornerstone' provision of the *UN Charter*.³⁴ In this respect, states have repeatedly condemned in principle 'armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements.'³⁵

D Indirect Force: The Provision of Arms and Non-lethal Assistance

While the use of force may be 'in the direct form of military action' using the armed forces of the intervening state, or other forces under the effective control of the state,³⁶ it may also be 'in the indirect form of support for subversive or terrorist armed activities within another State.'³⁷ In its treatment of the 'indirect form' of the use of force in the *Nicaragua* case the ICJ made a further distinction, in that

while the arming and training of [opposition forces] can certainly be said to involve the threat or use of force against [the state concerned] ... [T]he Court considers that the mere supply of funds to [opposition forces], while undoubtedly an act of intervention in the internal affairs of [the state concerned] ... does not in itself amount to a use of force.³⁸

As Schmitt notes, '[i]n what was tantamount to an application of agency theory, the Court determined that force apparently includes actively and directly preparing another to apply armed force, but not merely funding the effort.'³⁹ Indeed, while the provision of arms to non-state actors and opposition forces was firmly positioned by the Court as constituting both an unlawful intervention and an unlawful use of force,⁴⁰ there was something of a divide in the seriousness of the provision of different forms of non-lethal assistance. Although the provision

33 The International Law Commission expressed the view that 'the law of the Charter concerning the prohibition of the use of force in itself constitutes a conspicuous example of a rule in international law having the character of *jus cogens*': 'Report of the International Law Commission on the Work of Its Eighteenth Session' [1966] II *Yearbook of the International Law Commission* 172, 247. Furthermore, the ICJ in the *Nicaragua* case noted that the prohibition of the use of force 'is frequently referred to in statements by *State representatives* as being not only a principle of customary international law but also a fundamental or cardinal principle of such law': *Nicaragua* [1986] ICJ Rep 14, 100 [190] (emphasis added). See also Shaw, above n 15, 126.

34 J L Brierly, *The Law of Nations: An Introduction to the International Law of Peace* (Clarendon Press, 6th revised ed, 1963) 414.

35 *Declaration on the Inadmissibility of Intervention*, UN Doc A/RES/20/2131 para 1; *Declaration on Principles of International Law Concerning Friendly Relations*, UN Doc A/Res/25/2625 annex para 1 principle 3 (emphasis added).

36 *Nicaragua* [1986] ICJ Rep 14, 108 [205].

37 *Ibid.*

38 *Ibid* 119 [228].

39 Michael N Schmitt, 'Computer Network Attack and the Use of Force in International Law: Thoughts on a Normative Framework' (1999) 37 *Columbia Journal of Transnational Law* 885, 909.

40 The main reason for the opposition of certain states to the *Arms Trade Treaty* noted above, in particular Syria and Russia, was that it did not address, and more specifically did not expressly prohibit, the provision of arms to 'non-state terrorist groups' within a state. If the *Treaty* had addressed this issue, it would have expressly affirmed its illegality. However, it was not, upon the basis of the analysis here, strictly necessary to do so. See 'UN Passes Historic Arms Trade Treaty by Huge Majority', *BBC News* (online), 2 April 2013 <<http://www.bbc.co.uk/news/world-us-canada-21998394>>.

of training was similarly held by the Court as constituting both an unlawful intervention and an unlawful use of force, the supply of funds in itself was classified as a lesser act of unlawful intervention.

However, the provision of non-lethal *equipment*, as a form of non-lethal assistance, was not specifically raised and given treatment by the ICJ in the *Nicaragua* case, and neither has it been treated in any other case or advisory opinion before the Court, or indeed before any other court or tribunal. In this respect – and given that neither the general concept of non-lethal assistance nor any specific manifestations of it have been discussed fully in the international legal literature – whether the provision of non-lethal equipment in itself constitutes an unlawful intervention or unlawful use of force, or perhaps even neither, has not been entirely clarified. In addition, and in addressing this issue, there is also no clear and comprehensive discernible definition of what is incorporated under the notion of non-lethal equipment. On this point, however, the debate regarding the provision of such assistance in the Arab Spring context might indicate that it includes equipment such as radio communications equipment, non-armoured vehicles, and body armour.⁴¹ That is, equipment that while not having the primary aim of taking life nonetheless is provided with the aim of assisting the party concerned to prevail in an armed conflict, or at least to possess some (or better) capabilities to defend itself.

The concept of non-lethal equipment would thus appear at first sight to be positioned somewhere between the provision of 'arms and training', which constitutes a use of force under the Court's conceptual framework, and the 'supply of funds', which does not, but does constitute, nonetheless, an unlawful intervention. Indeed, the former of these two forms of assistance appears to be specifically targeted towards directly assisting the non-state actors in their armed insurgency against the government of the state, while the latter does not appear to have the same intended immediate and direct effect, and is instead arguably representative of a state's support for the overall aims of the non-state actors. In this respect, non-lethal equipment of the type highlighted above has a more specific use than the mere supply of funds and, while not of a lethal nature, is to be used in situations in which an armed struggle is taking place.

The 1970 *Declaration on Principles of International Law Concerning Friendly Relations*, which the ICJ took as representing customary international law, is instructive here in that it states in the context of the use of force that '[e]very state has the duty to refrain from organizing, instigating, *assisting* or participating in acts of civil strife or terrorist acts in another State ... *when the acts referred to in the present paragraph involve a threat or use of force*.'⁴²

As noted above, the ICJ has expressly held that the supply of funds does not in itself constitute an unlawful use of force, even, it can be assumed, if the opposition forces are engaged in acts of civil strife of a forcible nature. However,

41 See below Part III.

42 *Declaration on Principles of International Law Concerning Friendly Relations*, UN Doc A/Res/25/2625, annex para 1 principle 1 (emphasis added).

it is suggested here that upon the basis of the more immediate and direct impact upon the forcible actions of the opposition forces on the ground, that the provision of non-lethal equipment in the same circumstances would arguably constitute in itself an unlawful use of force, over and above an unlawful intervention.

E Non-lethal Equipment as Humanitarian Aid?

Non-lethal equipment might also be provided, however, specifically for humanitarian or protective purposes. In this sense the *humanitarian* as opposed to the *combative* purpose behind the provision of non-lethal equipment is emphasised. Yet, the ICJ was clear that it was only ‘the provision of *strictly* humanitarian aid to persons or forces in another country’ that ‘cannot be regarded as unlawful intervention, or as in any other way contrary to international law.’⁴³ In defining what constituted ‘strictly humanitarian aid’, the Court drew upon US legislation, which limited aid to the Contra forces in Nicaragua to such assistance, and which defined it as: the provision of food, clothing, medicine, and other humanitarian assistance, and it does not include the provision of weapons, weapons systems, ammunition, or other equipment, vehicles, or material which can be used to inflict serious bodily harm or death.⁴⁴

Yet this, as the ICJ’s adopted typology of ‘humanitarian aid’, does not really clarify the issue as to whether the provision of non-lethal equipment such as radio communications equipment or body armour should escape censure as an unlawful act. While it is not of a similar nature to the types of humanitarian assistance expressly included here, in the case of equipment such as body armour it would, given its restricted defensive as opposed to offensive use, arguably be more accurately described as equipment of a humanitarian nature rather than ‘material which can be used to inflict serious bodily harm or death.’

However, such aid should, in any case, be distributed impartially to those in need ‘whatever their political affiliations or objectives.’⁴⁵ As such, regardless of whether it is to be classified as one or the other, assuming that it is provided by a state solely to the opposition forces it would nonetheless constitute at the very least an unlawful intervention.

43 *Nicaragua* [1986] ICJ Rep 14, 124 [242] (emphasis added).

44 *International Security and Development Cooperation Act of 1985*, Pub L No 99–83, § 722(g), 99 Stat 190, quoted in *ibid* 125 [243].

45 *Nicaragua* [1986] ICJ Rep 14, 124 [242]. Indeed, the Court noted at [243] that

[a]n essential feature of truly humanitarian aid is that it is given ‘without discrimination’ of any kind. In the view of the Court, if the provision of ‘humanitarian assistance’ is to escape condemnation as an intervention in the internal affairs of Nicaragua, not only must it be limited to the purposes hallowed in the practice of the Red Cross, namely ‘to prevent and alleviate human suffering’, and ‘to protect life and health and to ensure respect for the human being’; it must also, and above all, be given without discrimination to all in need in Nicaragua, not merely to the *contras* and their dependents.

F The Legal and Political Distinction between Intervention and Use of Force

While this section has set out the rubric under which an assessment can be made as to the legality of the provision of arms and non-lethal assistance to both governmental and opposition forces, the question is raised as to the significance, theoretically and practically, of distinguishing between general acts of intervention and those specific forms which constitute a use of force, particularly in the context of support for opposition forces.

As will have been ascertained thus far, international law provides for different normative levels of severity in connection with the act of intervention. In terms of the legal consequences attached to a breach of the principle of non-intervention, in both its general or more specific forcible variety, victim states are generally restricted to resorting to non-forcible countermeasures, although in the case of a use of force graver countermeasures may well be justified than in the case of a lesser intervention.⁴⁶ However, a breach of the prohibition of the use of force does at least open the door to the victim state being able to respond forcibly. Indeed, in the context of the topic under discussion in this article, if the forcible actions of the opposition forces are of a certain gravity, represent something that might be carried out by the forces of a state, and are controlled by the state concerned, then they may be classified as an 'armed attack'.⁴⁷ Only at this point can the victim state take forcible action by invoking its right of self-defence, whereas this door, or indeed any leading to a forcible response of any type, is clearly shut to states who are victims of lesser violations of the prohibition of intervention norm.

However, much of the effectiveness and significance of international law is based upon perception and reciprocity. It is perhaps here where the distinction between intervention and force becomes relevant as for the intervening state concerned the gravity of the particular intervention will affect how it is perceived by others, and perhaps, the possibilities for future cooperation. In this respect, a use of force can be considered to be 'normatively more flagrant' than an intervention for a number of reasons.⁴⁸ First, the principle of non-intervention is, of course, and as noted above, a customary rule rather than a treaty-based rule.⁴⁹ Normatively speaking, this makes little difference, but in fact arguably means that it is inherently perceived as being normatively weaker, vaguer, and more malleable than the prohibition of the use of force which is represented in both treaty and customary law. Secondly, coercive acts employing the use of force

46 There have been suggestions that the ICJ made implicit reference to countermeasures of a *forcible* variety in the *Nicaragua* case, when it indicated that in the situation of a use of force not amounting to the gravity of an 'armed attack', a state may be justified in resorting to 'proportionate countermeasures': see *ibid* 127 [249]; James A Green, *The International Court of Justice and Self-Defence in International Law* (Hart Publishing, 2009) 54–60.

47 See *Nicaragua* [1986] ICJ Rep 14, 103 [195].

48 Schmitt, above n 39, 909.

49 That is, aside from its inclusion in the *Charter of the Organization of American States*.

represent ‘those the [international] community most abhors’.⁵⁰ This is demonstrated, as noted above, through the prohibition of the threat or use of force being generally perceived as having special weight, in particular as a *jus cogens* norm.⁵¹ Thirdly, the use of force is perhaps perceived more negatively ‘by virtue of its far greater consequence-instrument congruence.’⁵² Armed coercion, whether through the direct use of force or by providing arms and/or certain forms of non-lethal assistance to opposition forces in their use of force, often results in death or serious injury and/or destruction of physical property,⁵³ whereas an unlawful intervention falling below a use of force is less likely to do so. Fourthly, an unlawful use of force risks escalating a conflict far more than a lesser (normatively speaking) unlawful intervention. This is due to the direct and immediate impact that the provision of arms and/or certain forms of non-lethal assistance can have upon the forcible actions of the opposition groups. Indeed, ‘the consequences of [a] use of force are almost immediately apparent’, whereas those of an unlawful intervention ‘although severe, emerge much more slowly, and thereby allow opportunity for reflection and resolution.’⁵⁴

G Acceptance and Confirmation of the Rules on the Provision of Arms and Non-lethal Assistance between the *Nicaragua* Case and the Arab Spring

The basic principles on the provision of arms and non-lethal assistance as enunciated and clarified by the ICJ in the 1986 *Nicaragua* case were based more on principle and the broad and general *opinio juris* extrapolated from UNGA resolutions and the *Charter of the Organization of American States* than on the physical manifestations of state practice that had been witnessed in the *UN Charter* era up to that point. They have, nonetheless, been accepted with virtually no dissent. As Corten, writing as recently as 2010, observed, ‘[t]he principle that one cannot help rebels ... does not seem to be contested by anyone, and controversies are more about the level above which such aid may be characterised as “armed attack” opening up the right to self-defence.’⁵⁵ Lieblich further notes that ‘[m]uch of the contemporary understanding of the scope of the principle [of non-intervention] is traced to the 1986 [ICJ] landmark ruling in the *Nicaragua* case.’⁵⁶ Indeed, between the *Nicaragua* case and the Arab Spring, as with the Cold War era, states have not generally expressed any support for an

50 Schmitt, above n 39, 912.

51 See above Part II(D).

52 Schmitt, above n 39, 911.

53 Ibid.

54 Ibid 911–12.

55 Olivier Corten, *The Law against War: The Prohibition on the Use of Force in Contemporary International Law* (Hart Publishing, 2010) 130. Whether the provision of arms and non-lethal assistance can rise to the level of an armed attack revolves more around the extent to which the actions of the non-state actors can be attributed to the states involved and not whether the provision of arms and/or non-lethal assistance is in itself sufficient to give rise to an armed attack. Such a question is therefore beyond the scope of this article.

56 Lieblich, above n 20, 42.

alteration of the principle of non-intervention so as to provide them with the right to provide arms and non-lethal military assistance to opposition forces, in or outside of a civil war, and neither have they generally justified such action upon another controversial legal ground.⁵⁷ For example, the support of Iran and Syria to Hezbollah in Lebanon has largely been covert,⁵⁸ while support by Rwanda and Uganda to rebel groups in the Democratic Republic of Congo, when acknowledged, was largely justified upon the basis of self-defence.⁵⁹ Thus, the subsequent practice to contradict such an interpretation of the prohibition of the use of force norm in article 2(4) of the *UN Charter*,⁶⁰ or the state practice and *opinio juris* necessary to modify the customary principle of non-intervention and the prohibition of the use of force,⁶¹ has not been discernible. As such, not only can the events of the Arab Spring be analysed under this framework as representing *lex lata* legal rules at the time, but the rules themselves can also be reassessed in light of these events in order to discern any reinterpretations or modifications to them.

III THE PROVISION OF ARMS AND 'NON-LETHAL' ASSISTANCE IN THE ARAB SPRING

As is now well known, the Arab Spring began in 2011 with the eruption of uprisings in both Tunisia and Egypt, which ultimately led to the toppling of the governmental regimes in each state and the installation of new ones.⁶² The provision of arms and non-lethal assistance was not an issue in these initial uprisings, or those that have since occurred in other states such as Yemen, Bahrain and Morocco.⁶³ Indeed, this only became significant in the context of the

57 On such grounds see below Part IV.

58 See, eg, Amos Harel and Avi Issacharoff, 'Syria Is Shipping Scud Missiles to Hezbollah', *Haaretz* (online), 13 April 2010 <<http://www.haaretz.com/print-edition/news/syria-is-shipping-scud-missiles-to-hezbollah-1.284141>>; 'Syria: Israel's Scud Accusation May Be Pretense for Attack', *Haaretz*, 15 April 2010 <<http://www.haaretz.com/news/syria-israel-s-scud-accusation-may-be-pretense-for-attack-1.284315>>.

59 The justification was rejected by the ICJ in the case of Uganda's support for the Congo Liberation Movement rebels (Mouvement de Libération du Congo): see *Armed Activities* [2005] ICJ Rep 168, 227 [164]–[165].

60 On subsequent practice as a means of interpreting treaties, see Art 31(3)(b) of the *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980).

61 On these two requirements for the formation and modification of customary international law, see above Part II(A).

62 See 'Arab Uprising: Country by Country – Tunisia', *BBC News* (online), 31 August 2012 <<http://www.bbc.co.uk/news/world-12482315>>; 'Arab Uprising: Country by Country – Egypt', *BBC News* (online), 31 August 2012 <<http://www.bbc.co.uk/news/world-12482291>>.

63 Saudi Arabia directly, as opposed to indirectly, intervened in support of the governing regime in Bahrain in March 2011: see William Butler, 'Saudi Arabian Intervention in Bahrain Driven by Visceral Sunni Fear of Shias', *The Guardian* (online), 20 March 2011 <<http://www.guardian.co.uk/world/2011/mar/20/bahrain-saudi-arabia-rebellion>>.

civil war and outside intervention that took place in Libya and the uprising and civil war that continues (at the time of writing) in Syria.

A Libya

On 17 March 2011, North Atlantic Treaty Organization ('NATO') forces were authorised by the UNSC in *Resolution 1973* to use 'all necessary measures' to 'protect civilians and civilian populated areas'.⁶⁴ Such an authorisation by the UNSC is a now well-accepted euphemism in the practice of the Council signifying permission to use force to achieve a specified goal, in this case the protection of civilians.⁶⁵ As noted above, force, as set out by the ICJ in the *Nicaragua* case, can be used directly, in the form of states acting through their own armed forces, or indirectly, in the form of the supply of arms and other forms of assistance to non-state forces.⁶⁶ In this sense, the authorisation provided in *Resolution 1973* did not state a preference for either modality in carrying out the mandate.⁶⁷ While the use of force was at first used directly by NATO in the protection of civilians in Libya,⁶⁸ it soon became clear that the armed forces of the acting states were in effect – and controversially – directly aiding the opposition forces to topple the Gaddafi regime through such measures.⁶⁹ Yet there was also much debate as to whether the authorisation contained within this particular resolution permitted, in addition to the direct forcible measures to protect civilians, indirect assistance through the provision of arms and 'non-lethal' assistance to the opposition forces in Libya.⁷⁰

The key issue in this respect was whether the authorisation provided in *Resolution 1973* overrode the arms embargo that had been imposed earlier in *Resolution 1970*.⁷¹ In paragraph nine of *Resolution 1970*, it was

[decided] that all Member States shall immediately take the necessary measures to prevent the direct or indirect supply, sale or transfer to the Libyan Arab Jamahiriya, from or through their territories or by their nationals, or using their flag vessels or aircraft, of arms and related materiel of all types, including weapons and ammunition, military vehicles and equipment, paramilitary equipment, and spare parts for the aforementioned, and technical assistance, training, financial or other assistance, related to military activities or the provision, maintenance or use of any arms and related materiel, including the provision of armed mercenary personnel whether or not originating in their territories...

Yet *Resolution 1973* subsequently went on to authorise 'Member States ... to take all necessary measures, *notwithstanding paragraph 9 of resolution 1970 (2011)*, to protect civilians and civilian populated areas under threat of attack in

64 SC Res 1973, UN SCOR, 66th sess, 6498th mtg, UN Doc S/RES/1973 (17 March 2011) para 4 ('*Resolution 1973*').

65 See Christian Henderson, *The Persistent Advocate and the Use of Force: The Impact of the United States upon the Jus ad Bellum in the Post-Cold War Era* (Ashgate, 2010) 42–51.

66 See above Part II(D).

67 Henderson, 'International Measures for the Protection of Civilians', above n 10, 770.

68 See Corten and Koutroulis, above n 12, 69–71.

69 Ibid 71–7.

70 See, eg, Henderson, 'International Measures for the Protection of Civilians', above n 10, 769–72.

71 SC Res 1970, UN SCOR, 6491st mtg, UN Doc S/RES/1970 (26 February 2011) ('*Resolution 1970*').

the Libyan Arab Jamahiriya.⁷² The question then was what types of indirect assistance, if any, were Member States permitted to provide in the process of fulfilling their mandate of protecting civilians, whether that be in response to the actions of either the government or opposition forces.

1 Training

While an 'occupation force' was specifically precluded from the 'means' authorised in *Resolution 1973*,⁷³ some NATO Member States involved in the campaign sent military personnel to the eastern rebel stronghold of Benghazi to 'advise' the opposition forces on logistics and intelligence training.⁷⁴ Under the ICJ's conceptual framework, as set out above in Part II, the provision of this form of non-lethal assistance constituted an unlawful use of force, and thus a violation of Article 2(4) of the *UN Charter*. Furthermore, the arms embargo in *Resolution 1970* also specifically and expressly precluded 'technical assistance, training, financial or other assistance, related to military activities'.⁷⁵ The training provided by the Member States on this occasion thus seemed to fall foul of both the general prohibition of the use of force and the specific terms of a UNSC resolution.

Yet, as noted above, *Resolution 1973* provided for the use of 'all necessary means' to protect civilians and civilian populated areas 'notwithstanding' the paragraph containing the arms embargo and prohibition on the provision of training. Under the *lex specialis* principle the specifics of the UNSC Resolution authorising the use of 'all necessary means' would thus seem to provide an exception to the non-intervention and non-use of force principles as well as the earlier UNSC imposed arms embargo, therefore making the provision of training lawful if, of course, it was necessary and used to protect civilians. However, given that the training was provided not to the civilians of Benghazi or Misrata in order to be better able to protect themselves, but instead to the forces of one party in a non-international armed conflict fighting to secure a change of regime, this would seem somewhat questionable. This was perhaps further confirmed by the publication of a joint letter by President Obama, President Sarkozy and Prime Minister Cameron on 15 April 2011 in which it was stated that the length of the operation would be determined by the time Colonel Gaddafi was to remain in power, thus making clear that the intentions of the intervening states were

⁷² *Resolution 1973*, UN Doc S/RES/1973, para 4 (emphasis added).

⁷³ Ibid.

⁷⁴ The states involved in sending such personnel were principally the United Kingdom ('UK'), France and Italy: see John Pienaar, 'Libya: MPs' Concerns over "Mission Creep" Grow', *BBC News* (online), 20 April 2011 <<http://www.bbc.co.uk/news/uk-politics-13142441>>; 'Libya: France and Italy to Send Officers to Aid Rebels', *BBC News* (online), 20 April 2011 <<http://www.bbc.co.uk/news/world-africa-13143988>>. However, there were reports that CIA and British Special Forces had been in Libya long before this announcement: see 'Obama Authorises Covert Aid to Libyan Rebels – Reports', *BBC News* (online), 31 March 2011 <<http://www.bbc.co.uk/news/world-us-canada-12915401>>.

⁷⁵ See SC Res 1970, UN SCOR, 66th sess, 6491st mtg, UN Doc S/RES/1970 (26 February 2011) ('*Resolution 1970*') para 9 (emphasis added).

somewhat broader than simply the protection of civilians on the ground during this period of civil unrest.⁷⁶

2 'Non-lethal' Equipment

As the intervention in Libya progressed it also subsequently emerged that 'non-lethal' military equipment – mainly in the form of body armour and satellite telephones – was also being provided to the opposition forces.⁷⁷ Despite a lack of authoritative clarity on the issue of the general legality of the provision of such equipment,⁷⁸ it is argued in this article that the supply of non-lethal equipment not only constitutes an unlawful intervention but in addition constitutes an unlawful indirect use of force through reasoning by analogy with the conceptual framework set out by the ICJ. This is particularly the case given that the opposition forces were engaged in a use of force and the equipment supplied was to aid them in that respect.

However, paragraph 9 of *Resolution 1970*, in setting out the arms embargo, and in making a distinction between offensive and defensive military equipment, determined that the embargo was not to apply to 'non-lethal military equipment intended solely for humanitarian or protective use'.⁷⁹ Indeed, the arms embargo could be read as significant in its inclusion of what might be termed a 'defensive arms' exception. The problem with the inclusion of such an exception, however, is that it implies that the provision of non-lethal military equipment would be lawful not only under the arms embargo but also under the principles of non-intervention and non-use of force. Indeed, in compounding this assumption, the fact that it specifically qualified the 'equipment' as being of a 'military' nature implies that it would be distributed to those engaged in civil unrest, confirming its provision as constitutive of a use of force.

However, the second half of this exception adds a further qualification to the type of non-lethal military equipment intended to be covered, in that it is expressly stated that the equipment should be 'intended solely for humanitarian or protective use.' It was noted above that the provision of protective non-lethal military equipment would arguably qualify as humanitarian aid and would thus not, in principle at least, fall foul of the prohibitions of intervention and use of force. For this to be the case it would need to be distributed purely based upon need and without discrimination, yet in the case of Libya such equipment was

76 Allegra Stratton, 'Obama, Cameron and Sarkozy: No Let-up in Libya until Gaddafi Departs', *The Guardian* (online), 15 April 2011 <<http://www.guardian.co.uk/world/2011/apr/15/obama-sarkozy-cameron-libya>>.

77 UK Prime Minister David Cameron claimed that *Resolution 1973* permitted 'assisting the rebels with non-lethal equipment': see 'Cameron: Libya UN Resolution Makes Mission "Difficult"', *BBC News* (online), 17 April 2011 <<http://www.bbc.co.uk/news/uk-politics-13107834>>. Furthermore, US officials told the Associated Press that the Obama Administration had decided to give the rebels \$25 million in 'non-lethal assistance' after assessing their capabilities and intentions: see 'Libya: France and Italy to Send Officers to Aid Rebels', above n 74.

78 See above Part II.

79 *Resolution 1970*, UN Doc S/RES/1970 para 9 (a).

distributed solely amongst members of the opposition forces and not those loyal to the Gaddafi regime.

Nevertheless, this express recognition that such equipment was not caught by the arms embargo, along with the authorisation to use 'all necessary means' to protect civilians in *Resolution 1973*, arguably meant that under the *lex specialis* principle, as with the provision of training above, the UNSC Resolutions had provided an exception to the non-intervention and non-use of force principles thus making the provision of this sort of non-lethal military equipment on this occasion lawful. However, again, this was only upon the basis that it could be demonstrated that the equipment was provided in the protection of civilians, as required by the authorisation in *Resolution 1973*. The fact that it was, as with the provision of training above, ultimately provided to a single party to a non-international armed conflict, and not directly to civilians, and with the suppliers of the equipment claiming that they would continue with their operations until regime change had been achieved, puts significant question marks over the legality of the provision of such equipment in this particular case. This is, of course, unless one accepts the proposition that civilians would only be protected in the longer term if Gaddafi was no longer in power.

3 Arms

While the UK and other acting states only ever expressly acknowledged providing training and non-lethal equipment to the opposition forces, it emerged that France had gone beyond this and provided weapons of a lethal variety.⁸⁰ Between the adoption of *Resolution 1970* on 26 February 2011 and *Resolution 1973* on 17 March 2011, the provision of arms had become clearly and expressly prohibited by paragraph nine of *Resolution 1970*. Indeed, the arms embargo prohibited the transfer of weapons to Libyan territory, meaning that the provision of arms to either the Gaddafi regime or the opposition forces was strictly prohibited under a UNSC obligation.⁸¹ After the adoption of *Resolution 1973* on 17 March 2011, however, the issue became whether the provision of arms was permitted if necessary for the protection of civilians. In other words, did the authorisation to use 'all necessary means' really mean *all* necessary means?

Given that it was generally accepted that it was the forces of the Gaddafi regime that were posing the main threat to civilians, the imposition of the arms embargo signified that the provision of arms to the Gaddafi regime was strictly prohibited.⁸² As such, and as with the provision of training and non-lethal

80 Richard Spencer, 'France Supplying Weapons to Libyan Rebels', *The Telegraph* (online), 29 June 2011 <<http://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/8606541/France-supplying-weapons-to-Libyan-rebels.html>>.

81 Art 25 of the *UN Charter* provides that '[t]he Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.'

82 Although China had reportedly offered to sell arms to the Gaddafi Regime in Libya in July 2011 in contravention of the UNSC arms embargo: see 'Libya: Chinese Denies Defying UN Arms Embargo', *The Telegraph* (online), 5 September 2011 <<http://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/8742833/Libya-Chinese-denies-defying-UN-arms-embargo.html>>.

military equipment above, it appeared that arms might be lawfully provided to the opposition forces if they were to be used solely for the protection of civilians. The problem, again, with this argument is that it was not the civilians themselves that were being provided with the weapons. Indeed, while the direct action undertaken by the intervening forces may be construed as offering such protection, the provision of weapons to the opposition forces could only be interpreted, at best, as delegating the task of protecting civilians out to others, or upon a less favourable interpretation, assisting an organised opposition force to prevail in a civil war. As noted above, the joint statement by the leaders of the UK, the US, and – significantly in this context – France, seemed to indicate that the latter interpretation was the method in which it was believed the protection of civilians would ultimately be secured. However, if the prospect of regime change proved controversial amongst states, the prospect of achieving this through the provision of arms also proved controversial, including amongst members of the UNSC.⁸³ Echoing this sentiment was the NATO Secretary-General, Anders Fogh Rasmussen, who was clear when he said that '[w]e are not in Libya to arm people. We are in Libya to protect civilians against attacks.'⁸⁴

There are perhaps two things that seem clear following the expansive interpretation given to the mandate in Libya by certain NATO Member States. First, the type of force must be directed exclusively towards achieving the specific aim of the mandate provided, in this case the protection of 'civilians or civilian populated areas'. As such, any actions undertaken by the Coalition which had the aim of achieving other goals constituted a use of force taken outside of the terms of the Resolution, and were thus unlawful. If such actions involved the provision of training or arms, then these were specifically caught by the arms embargo. Secondly, and as argued by the author elsewhere,⁸⁵ given that the resolutions are drafted and adopted by the Council Members themselves, any interpretation and implementation of their provisions needs to be agreed upon by the Council if they are to be deemed lawful. As the interventions in Iraq in 2003 and Libya in 2011 vividly demonstrated, unilateral stretching of the boundaries of the UNSC resolutions beyond those intended has negative consequences for future multilateral action. The lack of decisive action by the Council in Syria is a stark reminder of this, and in particular, of the fallout of the unilateral expansive interpretations given by some to the Resolutions in Libya.

83 It was reported that even the UK feared that supplying arms to the rebels could be considered a breach of *Resolution 1973*: see Keesing's Worldwide, 'Jun 2011 – Continuing Civil War' [2011] *Keesing's Record of World Events* 50539; Bruno Waterfield, 'Libya: Legal Implications of Arming the Rebels', *The Telegraph* (online), 30 March 2011 <<http://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/8416856/Libya-legal-implications-of-arming-the-rebels.html>>.

84 Niall Paterson, 'Confusion Reigns over Arming Libyan Rebels', *Sky News* (online), 31 March 2011 <<http://news.sky.com/home/world-news/article/15963069>>.

85 See Henderson, *The Persistent Advocate and the Use of Force*, above n 65; Henderson, 'International Measures for the Protection of Civilians', above n 10.

B Syria

The civil war in Syria has witnessed much hesitation on the part of the international community. The UNSC has not imposed a general arms embargo as it did in Libya and there has certainly been no sign of a resolution being adopted of a similar nature as that of *Resolution 1973*.⁸⁶ This led Susan Rice, upon leaving her role as US Ambassador to the UN on 26 June 2013, to comment that the inaction of the UNSC in Syria was a 'stain' upon the reputation of the body.⁸⁷

In the absence of an authorising resolution from the UNSC, the situation in Syria thus raises legal questions regarding the provision of support to both the government and opposition forces involved, but which relate more directly to the principles of non-intervention and non-use of force in the international community. While, as noted above, the UNSC has not imposed an arms embargo in the context of this conflict, the European Union ('EU') adopted an arms embargo upon the territory of Syria in May 2011 shortly after the civil unrest had begun.⁸⁸ The following analysis is consequently divided into two sub-sections, with the first focusing upon the positions, actions and obligations of EU states and the second on those of non-EU states.

1 EU States

On 9 May 2011, the EU imposed an arms embargo upon the entire territory of Syria – banning the supply by its members of 'equipment which might be used for internal repression ... to any person, entity or body in Syria or for use in Syria'.⁸⁹ A list of such equipment was included in an annex to the Regulation and included, alongside traditional lethal equipment such as firearms, ammunition and explosive materials and devices, equipment that might more accurately be described as 'non-lethal', such as vehicles and protective equipment including body armour and helmets.⁹⁰ Interestingly, the Regulation also provided '[b]y way of derogation' that Member States 'may authorise the sale, supply, transfer or export of equipment which might be used for internal repression, under such

86 Speculation can be made as to the real reasons for this hesitation. However, it is perhaps safe to say that they arguably include the disagreements over the interpretation of *Resolution 1973* in Libya, the interests of Russia, China and the US in the region, the potential for an even greater refugee flow from Syria into neighbouring states, and the possibility of intervention in the conflict by neighbouring states and non-state actors.

87 'Susan Rice: Syria Inaction a "Stain" on Security Council', *BBC News* (online), 26 June 2013 <<http://www.bbc.co.uk/news/world-us-canada-23057745>>.

88 See below Part III(B)(1).

89 *Regulation (EU) No 442/2011 of 9 May 2011 Concerning Restrictive Measures in View of the Situation in Syria* [2011] OJ L 121/1, art 2(1)(a) ('*Regulation (EU) No 442/2011*'). See also 'EU Imposes Arms Embargo on Syria', *The Guardian* (online), 10 May 2011 <<http://www.guardian.co.uk/world/2011/may/09/syria-european-union-arms-embargo>>.

90 On 15 October 2012 the EU tightened the embargo so as to prohibit the importation of Syrian weapons to Europe, the transportation of them anywhere or the supply of any financial services such as insurance to fund purchases of Syrian arms. See Justyna Pawlak and Sebastian Moffett, 'EU Tightens Sanctions on Syrian Arms Industry', *Reuters* (online), 15 October 2012 <<http://www.reuters.com/article/2012/10/15/syria-crisis-eu-idUSL5E8FLZC20121015>>.

conditions as they deem appropriate, if they determine that such equipment is intended solely for humanitarian or protective use.⁹¹ This would seem, at face value at least, to provide the necessary loophole to enable states to provide arms and non-lethal equipment to the opposition forces in Syria if it was argued that they were intended ‘solely for humanitarian or protective use.’ Although perhaps unlikely, the requirement that humanitarian aid be distributed non-discriminatively, as discussed above in Part II(E), may have deterred the use of this as a loophole by EU states for its provision solely to the opposition forces.

Nevertheless, the UK Foreign Secretary, William Hague, informed the UK Parliament on 10 January 2013 that he sought to amend the arms embargo so that ‘additional assistance’ would be available to the opposition forces.⁹² After pressure by certain states, the embargo was modified on 28 February 2013 so as to permit the provision of non-lethal military equipment, such as armoured vehicles, and technical aid to the National Coalition for Syrian Revolutionary and Opposition Forces (‘Syrian National Coalition’),⁹³ provided that they were intended to protect civilians.⁹⁴ In response to these changes to the terms of the EU’s arms embargo, William Hague announced to the Parliament on 6 March 2013 that in addition to search and rescue equipment, communications equipment, and disease-prevention materials, the UK would also send ‘non-lethal military equipment’, such as armoured vehicles and body armour, and provide ‘assistance, advice and training’ to opposition forces in Syria ‘to help save lives’.⁹⁵ The provision of such non-lethal assistance was described by Mr Hague as a ‘necessary, proportionate and lawful’ response to extreme human suffering and Iran’s increasing support for the Assad regime, although he did not offer any explanation as to how it constituted such a response.⁹⁶

In the context of Iran and Russia continuing to provide the Assad regime with arms,⁹⁷ certain EU states, in particular the UK and France, pushed for either a further relaxation of the arms embargo or its cessation altogether so as to permit the unrestricted provision of arms to the opposition forces. William Hague continued to stress that providing the opposition forces with arms could not be

91 *Regulation (EU) No 442/2011* [2011] OJ L 121/1, art 2(3).

92 UK Government, *Foreign Secretary Updates Parliament on Syria* (10 January 2013) <<https://www.gov.uk/government/speeches/foreign-secretary-updates-parliament-on-syria>>; ‘Hague: “Options Open” on Military Support for Syrian Rebels’, *BBC News* (online), 10 January 2013 <<http://www.bbc.co.uk/news/uk-politics-20969386>>.

93 The Syrian National Coalition is a coalition of opposition groups in the Syrian Civil War, including the Free Syrian Army, that was founded in Doha, Qatar, in November 2012.

94 *Council Decision 2013/109/CFSP of 28 February 2013 Amending Decision 2012/739/CFSP Concerning Restrictive Measures against Syria* [2013] OJ L 58/8, art 1.

95 See United Kingdom, *Parliamentary Debates*, House of Commons, 6 March 2013, vol 559, cols 963, 979 (William Hague); ‘UK to Send Armoured Vehicles to Syrian Opposition’, *BBC News* (online), 6 March 2013 <<http://www.bbc.co.uk/news/uk-politics-21684105>>.

96 ‘UK to Send Armoured Vehicles to Syrian Opposition’, above n 95.

97 ‘Iran “Steps up Syria Support”, Hillary Clinton Warns’, *BBC News* (online), 1 February 2013 <<http://www.bbc.co.uk/news/world-us-canada-21289219>>.

ruled out,⁹⁸ while at the same time claiming that the UK was 'determined that all [its] actions [would] uphold UK and international law, and support justice and accountability for the Syrian people themselves' although, again, omitting to offer any explanation as to how such actions would fit within the international legal framework governing them.⁹⁹ The UK Prime Minister, David Cameron, in more unembellished tones, stated in March 2013 that the UK may veto the EU arms embargo altogether – which was due for renewal at the end of May 2013 – if things deteriorated on the ground in Syria.¹⁰⁰ In a less radical proposal, the UK subsequently circulated a draft document to EU diplomats in early May 2013 in which it suggested two options; either fully exempt the Syrian National Coalition from the arms embargo or remove the 'non-lethal' wording contained within it so as to permit lethal weapons to be supplied to them.¹⁰¹ This came not long after the commander of the Free Syrian Army had called for a lifting of the EU arms embargo altogether, claiming that it had a greater negative effect on the opposition than on the Assad regime.¹⁰²

EU members were divided over whether to lift the embargo, with some, such as Germany, concerned that this would lead to a proliferation of arms in Syria and the surrounding region.¹⁰³ Nonetheless, on 27 May 2013 EU Foreign Ministers decided not to renew the embargo upon the supply of arms to the Syrian opposition forces.¹⁰⁴ While there was an informal agreement at this time not to proceed with the delivery of arms, there was also no longer any EU obligations upon individual Member States to refrain from doing so. This lifting of the embargo to permit the provision of arms to the opposition forces thus renders this form of assistance lawful under EU law, along with that of a 'non-lethal' nature. However, it nonetheless remains questionable whether such support from EU, or indeed non-EU, states is lawful under *international* law. In this respect, Russian Foreign Minister, Sergey Lavrov, stated during a visit to London in March 2013 to meet with his UK counterpart, that '[i]nternational law doesn't allow, doesn't permit, the supplies of arms to non-governmental actors. It's a violation of international law.'¹⁰⁵

98 UK Government, above n 92; 'Hague: Giving Arms to Syrian Rebels Cannot Be Ruled Out', *BBC News* (online), 3 March 2013 <<http://www.bbc.co.uk/news/uk-21647014>>.

99 UK Government, above n 92.

100 'Syria: UK's Cameron "May Veto EU Arms Embargo"', *BBC News* (online), 12 March 2013 <<http://www.bbc.co.uk/news/uk-politics-21763345>>.

101 'EU Arms Embargo on Syria: Scrap It or Drop "Non-lethal" Wording, Says UK', *RT* (online), 9 May 2013 <<http://rt.com/news/uk-eu-arms-embargo-syria-027/>>.

102 'Free Syrian Army Chief: "We Need Arms and Aid"', *BBC News* (online), 6 March 2013 <<http://www.bbc.co.uk/news/world-middle-east-21681863>>.

103 'France and Germany Divided over Syrian Arms Embargo', *EurActiv.com* (online), 12 March 2013 <<http://www.euractiv.com/global-europe/france-germany-divided-syria-arm-news-518425>>.

104 'EU Arms Embargo on Syrian Opposition Not Extended', *The Guardian* (online), 28 May 2013 <<http://www.guardian.co.uk/world/2013/may/27/eu-arms-embargo-syrian-opposition>>.

105 Luke Harding, 'Russia Warns UK against Arming Syrian Rebels', *The Guardian* (online), 14 March 2013 <<http://www.guardian.co.uk/uk/2013/mar/13/russia-warns-uk-syrian-rebels>>.

After claims had been made that the Assad regime had used Sarin nerve gas,¹⁰⁶ French President François Hollande asserted on 5 June 2013 that proof of chemical weapons use in Syria ‘obliged the international community to act’ and that any action in response had to be ‘within the framework of international law’,¹⁰⁷ although no explanation was proffered as to where the obligation to act came from, whether it was of a legal nature, and how such a response would fit within the legal framework governing such actions. While at the time of writing it is not clear whether, and if so which, Member States have delivered arms to the opposition forces in Syria,¹⁰⁸ before addressing the possible unilateral legal justifications that might be relied upon to justify such action in Part IV of this article, it remains first to examine the position of non-EU states on the provision of arms and non-lethal assistance to the Syrian opposition forces.

2 Non-EU States

Upon the basis of the framework set out above in this article, the provision of arms by Iran and Russia to the Assad regime is not *prima facie* unlawful, while states are not permitted to provide arms and non-lethal military equipment to the opposition forces under the prohibitions of intervention and force.¹⁰⁹ Non-EU states have generally attempted to stay within this framework and refrained from providing arms and non-lethal military equipment to the opposition forces, or at least openly claimed that they have.

Nonetheless, some, and most notably the US, began providing aid of a financial nature, primarily due to the opposition groups in Syria making clear their frustration at the status quo.¹¹⁰ For example, the US Secretary of State, John Kerry, announced at the Friends of Syria Group in Rome in February 2013 that the US would provide \$60 million of ‘non-lethal’ aid to support the Syrian National Coalition ‘in its operational needs, day to day’.¹¹¹ However, there was no indication that this manifested itself in the form of military equipment or training, but instead appeared to be in the form of funds to aid the daily activities

106 ‘France’s Fabius “Confirms Sarin Use” by Syria Regime’, *BBC News* (online), 5 June 2013 <<http://www.bbc.co.uk/news/world-middle-east-22773268>>.

107 ‘Syrian Army Retakes Key Town of Qusair from Rebels’, *BBC News* (online), 5 June 2013 <<http://www.bbc.co.uk/news/world-middle-east-22778310>>.

108 Although there are reports that Croatia has been selling arms to the opposition forces in Syria from an undeclared surplus from the Balkan conflict in the 1990s: see ‘Who Is Supplying Weapons to the Warring Sides in Syria’, *BBC News* (online), 14 June 2013 <<http://www.bbc.co.uk/news/world-middle-east-22906965>>. However, Croatia only became a member of the EU on 1 July 2013 thus meaning that the EU arms embargo, which came to an end on 31 May 2013, had not applied to it.

109 That is, unless one takes the view that the provision of arms to any party in a civil war is unlawful. See *below* Part IV(C) for more on this argument.

110 Jonathan Marcus, ‘Frustration Forces Western Shift on Syria’, *BBC News* (online), 28 February 2013 <<http://www.bbc.co.uk/news/world-middle-east-21621691>>.

111 John Kerry, ‘Remarks with Italian Foreign Minister Giulio Terzi and Syrian Opposition Council Chairman Moaz al-Khatib’ (Speech delivered at Villa Madama, Rome, 28 February 2013) <<http://www.state.gov/secretary/remarks/2013/02/205457.htm>>; ‘Kerry Pledges \$60m in “Non Lethal” Aid to Syrian Rebels’, *BBC News* (online), 28 February 2013 <<http://www.bbc.co.uk/news/world-middle-east-21612194>>.

of the Syrian National Coalition as an opposition group. If this was the case, then under the conceptual framework set out above, it constitutes an unlawful intervention, although would not extend to an unlawful use of force.¹¹² However, even if it could be condemned upon this basis as a violation of international law, it received very little in the way of such condemnation from other states. With the commander of the Free Syrian Army urging the international community to provide weapons and ammunition to fighters in the battle against the Assad regime,¹¹³ the US decided to go further in its support for the opposition forces. Yet, this was only to announce in April 2013 a doubling of aid to include non-lethal military assistance and humanitarian aid,¹¹⁴ thereby nonetheless potentially engaging the prohibition of the use of force.

In many ways tying his hands, President Obama had in 2012 described the use of chemical weapons by the Assad regime as a 'red line' that would change his administration's 'calculus' in the region with the possibility for a greater level of intervention in Syria.¹¹⁵ While many states had claimed proof of the use of chemical weapons in Syria,¹¹⁶ the US simply claimed that there were 'varying degrees of confidence' that they had in fact been used,¹¹⁷ thereby being able to avoid committing to any firm action, including of a forcible nature. However, with such claims beginning to gain momentum, and with events on the ground in Syria continuing to deteriorate, Chuck Hagel, the US Secretary of Defense, stated on 2 May 2013 that arming the opposition forces was an option.¹¹⁸ Subsequently, on 14 June 2013, the US announced that in light of concluding that 'small amounts' of chemical weapons had been used by the Assad regime, it would provide military assistance to the Syrian opposition forces, although it did not specify what this would include, only that it would be 'different in scope and

112 See above Part II(D).

113 'Free Syrian Army Chief: "We Need Arms and Aid"', above n 102. There have also been calls by the Free Syrian Army for recognition as the government to allow such a provision to occur: see below Part IV(B).

114 'Secretary Kerry Announces Doubling of US Non-lethal Assistance to the Syrian Opposition and New Humanitarian Aid for the Syrian Crisis' (Press Release, PRN 2013/0453, 20 April 2013) <<http://www.state.gov/r/pa/prs/ps/2013/04/207810.htm>>.

115 James Ball, 'Obama Issues Syria a "Red Line" Warning on Chemical Weapons', *The Washington Post* (online), 21 August 2012 <http://www.washingtonpost.com/world/national-security/obama-issues-syria-red-line-warning-on-chemical-weapons/2012/08/20/ba5d26ec-eaf7-11e1-b811-09036bcb182b_story.html>.

116 See, eg, 'Chemical Weapons Used in Syria, Says Turkey', *France 24* (online), 11 May 2013 <<http://www.france24.com/en/20130511-chemical-weapons-syria-turkey>>. In light of the presentation of this evidence some have accused President Obama of backtracking on his 'red line' stance: see 'Obama Walks Back "Red Line" Stance on Syrian Government Using Chemical Weapons', *Fox News* (online), 30 April 2013 <<http://www.foxnews.com/politics/2013/04/30/obama-walks-back-red-line-stance-on-syrian-government-using-chemical-weapons/>>.

117 'US Has "Some Confidence" Syria Used Chemical Weapons', *BBC News* (online), 25 April 2013 <<http://www.bbc.co.uk/news/business-22297569>>.

118 Thom Shanker and Mark Landler, 'Hagel Confirms US Is Considering Arming Syria Rebels', *The New York Times* (online), 2 May 2013 <http://www.nytimes.com/2013/05/03/world/middleeast/hagel-confirms-us-is-considering-arming-syrian-rebels.html?_r=0>.

scale to what we have provided before.¹¹⁹ While it was not clear when and by what means such arming and provision of military assistance would occur, there was speculation that the CIA would coordinate delivery of the military equipment and train the opposition forces in the use of it.¹²⁰ Following this, on 22 June 2013, the Foreign Ministers of the Friends of Syria Group, who were meeting in Qatar at the time, agreed to 'provide urgently all the necessary materiel and equipment to the opposition on the ground, each country in its own way in order to enable them to counter brutal attacks by the regime and its allies.'¹²¹

Despite a notable shift in attitude by both EU and non-EU states to the provision of non-lethal assistance and, most notably, arms, it transpired that some non-EU states had been providing arms to the opposition forces for some time. While this was most notably Qatar and Saudi Arabia,¹²² there were also reports that Libya, Jordan, Iraq, and Lebanon had provided arms, while Turkey had provided the route into Syria for such arms and the US had provided a coordinating role.¹²³ While states have both covertly and overtly provided arms to the opposition forces, a notable absence has been any sort of justification, and in particular one of a legal nature, for such provision. This may, of course, simply be an implicit acknowledgement of the illegality of such action. On the other hand, it may indicate that these states feel that their actions are somehow inherently lawful thereby excluding the need to justify them. Either way, given that such action is taking place, whether there is the possibility under international law for unilaterally providing arms and/or non-lethal assistance to the opposition forces remains to be assessed in the next section.

119 'US Says It Will Give Military Aid to Syria Rebels', *BBC News* (online), 14 June 2013 <<http://www.bbc.co.uk/news/world-us-canada-22899289>>. While the previous US Secretary of State, Hillary Clinton, and Head of the CIA, David Petraeus, put a plan to arm carefully vetted opposition forces in Syria to the White House in the summer of 2012, this was not ultimately approved: Michael R Gordon, 'Backstage Glimpses of Clinton as Dogged Diplomat, Win or Lose', *The New York Times* (online), 2 February 2013 <<http://www.nytimes.com/2013/02/03/us/politics/in-behind-scene-blows-and-triumphs-sense-of-clinton-future.html>>. The then Secretary of Defense, Leon Panetta, recently acknowledged his continued support for the plan: see 'Panetta Backs Syria Rebels Arms Plan', *BBC News* (online), 7 February 2013 <<http://www.bbc.co.uk/news/world-us-canada-21373367>>.

120 'US Says It Will Give Military Aid to Syria Rebels', above n 119.

121 'Friends of Syria Will Arm Rebels for Fight against Assad and Hezbollah', *The Guardian* (online), 23 June 2013 <<http://www.guardian.co.uk/world/2013/jun/22/us-arms-syria-rebels-assad-hezbollah>>.

122 It is widely reported that both Qatar and Saudi Arabia have been channelling arms through Turkey to the Syrian opposition forces: see Justin Vela, 'Exclusive: Arab States Arm Rebels as UN Talks of Syrian Civil War', *The Independent* (online), 13 June 2012 <<http://www.independent.co.uk/news/world/middle-east/exclusive-arab-states-arm-rebels-as-un-talks-of-syrian-civil-war-7845026.html>>.

123 See 'Who Is Supplying Weapons to the Warring Sides in Syria', above n 108.

IV EXAMINING THE POSSIBILITIES FOR THE PROVISION OF ARMS AND 'NON-LETHAL' ASSISTANCE TO OPPOSITION GROUPS

A Authorisation by the UNSC

Besides self-defence, the only established exception to the prohibition of the use of force is that of authorisation by the UNSC.¹²⁴ As noted above, this authorisation equates to permission to use force and such force may be of either a direct or indirect nature.¹²⁵ While there is nothing in principle to prevent the UNSC from expressly authorising states to specifically arm or supply non-lethal assistance to either government or opposition forces, this would nevertheless be an unusual thing for a resolution of this organ to include.¹²⁶ Although in Libya states were authorised to use 'all necessary means' to protect civilians and civilian-populated areas notwithstanding a previously imposed arms embargo, whether this actually incorporated the possibility of providing such aid to the opposition forces, as some argued that it did, was not ultimately clear.¹²⁷ However, it is not beyond the realms of possibility that a resolution of the UNSC may be more clearly directed towards the necessity of aiding a clearly identified group so that it would be able to hold its own in an armed conflict. While this is a theoretical possibility, given the relative deadlock that has been witnessed in the UNSC over the adoption of *any* resolution regarding the situation in Syria, this is certainly not a realistic possibility in the context of this particular conflict.

B Government Recognition

It was discussed above in Part II that states are permitted per se to provide arms and non-lethal assistance to the armed forces of the government of a state. The government may be of a de jure nature, in that it represents the constitutional governmental authority and/or democratically elected power. However, governmental power may also be determined on the basis of an entity exercising effective control over the territory and population of a particular state.¹²⁸

124 See Niels Blokker, 'Is the Authorization Authorized? Powers and Practice of the UN Security Council to Authorize the Use of Force by "Coalitions of the Able and Willing"' (2000) 11 *European Journal of International Law* 541; Gray, above n 3, 327–69; Henderson, *The Persistent Advocate and the Use of Force*, above n 65, 37–62; Yoram Dinstein, *War, Aggression and Self-Defence* (Cambridge University Press, 5th ed, 2011) 303–35. For discussion of a possibility to assist the rebels under the general umbrella of self-defence, see below Part IV(F).

125 See above Parts II, III(A).

126 Henderson, 'International Measures for the Protection of Civilians', above n 10, 770.

127 See above Part III(A).

128 As a matter of international law, effective control is arguably the determinative factor for governmental authority. As stated in the *Tinoco* case, it is 'independence and control' that entitles an entity to be classed as a national personality: see *Aguilar-Amory and Royal Bank of Canada Claims* (1923) 1 RIAA 369, 381 (William H Taft). James Crawford has also noted, in reference to this arbitral decision, that '[i]n the case of governments, the "standard set by international law" is so far the standard of secure *de facto* control of all or most of the state territory': James Crawford, *Brownlie's Principles of Public International Law* (Oxford University Press, 8th ed, 2012) 152.

Nevertheless, in either situation, a government might be considered to be rather weak if it could not also engage in daily interactions and do business with other states. In this sense, the international legitimacy of a governmental regime is acquired through external recognition by other states.¹²⁹ Thus, if the opposition forces within a state were to subsequently go on to exercise large scale effective control over the territory of the state and/or receive recognition as the government of the state concerned then it would arguably be lawful per se to provide them with arms and non-lethal forms of assistance.

States do not today generally offer express recognition to governments, which is normally left to be implicitly determined upon the basis of their interaction with the regime concerned.¹³⁰ However, there have been some conspicuous exceptions to this. For example, states were quick to provide – and then maintain – their recognition of the government of Alassane Ouattara in the aftermath of his success in elections in the Republic of Côte d'Ivoire in 2010 even though it was Laurent Gbagbo who remained in effective control of the country for some time afterwards.¹³¹ Similarly, and in the immediate context of the Arab Spring, many states recognised the Libyan National Transitional Council ('NTC') as the government of Libya while the regime of Colonel Gaddafi continued to effectively control much of Libya, particularly territory in the west of the state.¹³² This latter recognition had various legal consequences, such as the release of assets held in various states to the opposition forces.¹³³ Nevertheless, it has been argued that recognition of the NTC as the government of Libya 'when it did not have effective control of most of Libya was premature and therefore of dubious legality.'¹³⁴ As such, it might also be argued that any provision of arms or non-lethal assistance to the NTC after this recognition had been provided may well have been unlawful. In the case of Libya, however, the supply of arms and training onto the territory of the state was prohibited, except perhaps in the context of the protection of civilians,¹³⁵ meaning that even if the NTC was lawfully recognised as the government of Libya this did not have an

129 See Shaw, above n 15, 454–9.

130 During the late 20th century, many states adopted the position of nonrecognition of governments primarily due to the perception that recognition equated to approval, which often proved embarrassing, for example where the governmental regime concerned was violating human rights. For a discussion of this policy in connection with the recognition of the National Transitional Council ('NTC') in Libya, see Dapo Akande, 'Which Entity Is the Government of Libya and Why Does it Matter?' (16 June 2011) EJIL Talk! <<http://www.ejiltalk.org/which-entity-is-the-government-of-libya-and-why-does-it-matter/>>.

131 See Jean d'Aspremont, 'Duality of Government in Côte d'Ivoire' (4 January 2011) EJIL Talk! <<http://www.ejiltalk.org/duality-of-government-in-cote-divoire/#more-2898>>.

132 See Stephan Talmon, 'Recognition of the Libyan National Transitional Council' (2011) 15(16) *ASIL Insights* 1.

133 See Dapo Akande, 'Recognition of Libyan National Transitional Council as Government of Libya' (23 July 2011) EJIL Talk! <<http://www.ejiltalk.org/recognition-of-libyan-national-transitional-council-as-government-of-libya/>>.

134 Dapo Akande, 'Would It Be Lawful for European (or Other) States to Provide Arms to the Syrian Opposition?' (17 January 2013) EJIL Talk! <<http://www.ejiltalk.org/would-it-be-lawful-for-european-or-other-states-to-provide-arms-to-the-syrian-opposition/>>.

135 See above Part III(A).

impact in and of itself upon the legality of the provision of arms and non-lethal assistance to it.

It is thus of some significance that the Syrian National Coalition has been calling on states to recognise it as the 'transitional government', specifically so as to permit states to provide it with weapons in its struggle against the Assad regime. Indeed, the former head of the Coalition, Mouaz al-Khatib, stated that '[w]hen we get political recognition, this will allow the coalition to act as a government and hence acquire weapons and this will solve our problems.'¹³⁶ It is certainly true that in the absence of a general arms embargo upon the territory of Syria, the Syrian National Coalition's recognition as the government may in principle have an impact upon the legality of the provision of arms to it. While, as with the NTC in Libya, recognition of the Syrian National Coalition as the government of Syria would at this stage be arguably premature, at least until the Coalition has gained effective control of all or most of the territory of Syria, such recognition would nonetheless appear to make the provision of arms and non-lethal assistance lawful under international law.

At the time of writing, however, states have thus far steered clear of recognising the Syrian National Coalition as the 'government' of Syria, but have instead restricted their recognition of the Coalition to 'the "legitimate representatives" of the Syrian people.'¹³⁷ It might be argued that, despite the recognising states refraining from using the word 'government' in their statements of recognition, governmental recognition was nonetheless their intention.¹³⁸ However the intention of the recognising states seems to be generally clear in this instance. France, for example, appeared to choose its words carefully in not recognising the Syrian National Coalition as the government of Syria, but rather as 'the *future* government of a democratic Syria',¹³⁹ thus perhaps providing some legitimacy to its claim of self-determination,¹⁴⁰ but nonetheless making any provision of arms and non-lethal assistance under such a level of recognition unlawful. Indeed, the French President, François Hollande, stated that France would not address the issue of providing arms 'as long as it wasn't clear where these weapons went'.¹⁴¹ 'With the coalition', the President continued to add, 'as soon as it is a legitimate government of Syria, this question will be looked at by France, but also by all countries that recognise this government.'¹⁴² The US was also clear that it was not prepared to recognise the Syrian National Coalition as a 'government-in-exile' but only, and in joining other states, as 'the "legitimate representative" of

136 'Syria: France Backs Anti-Assad Coalition', *BBC News* (online), 13 November 2012 <<http://www.bbc.co.uk/news/world-middle-east-20319787>>.

137 See 'Syria Conflict: UK Recognises Opposition, Says William Hague', *BBC News* (online), 20 November 2012 <<http://www.bbc.co.uk/news/uk-politics-20406562>>.

138 See Talmon, above n 132, on the importance of intention in these matters.

139 'Syria: France Backs Anti-Assad Coalition', above n 136 (emphasis added).

140 See below Part IV(D).

141 'Syria: France Backs Anti-Assad Coalition', above n 136.

142 *Ibid.*

the Syrian people'.¹⁴³ This lesser recognition thus appears to preclude government recognition as a legal basis upon which to justify the provision of weapons, training, and non-lethal military equipment to the opposition forces in Syria.

C Counter-intervention

Where there is no UNSC arms embargo upon the territory of a state, of the type imposed in Libya, there is nothing in principle to legally preclude states from providing arms and non-lethal assistance to the governmental authorities concerned. Yet there is some support for the view that when a civil war is identifiable, that is, an internal armed struggle for power within a state the outcome of which is not certain, states are under a legal obligation to refrain from intervening in support of *either* side, whether the belligerent parties happen to be two non-governmental forces or the governmental forces of the state concerned and an opposition force. Those who adopt this view argue that in such a situation the citizens of each state should be allowed to determine their state's political future independently and without outside interference. Indeed, intervention in support of one party would mean that the intervening state would be influencing the outcome of a conflict which is in the balance thereby preventing the *state* as a whole from determining its own future. There is support for this view from states,¹⁴⁴ scholars,¹⁴⁵ and the Institut de Droit International.¹⁴⁶ In broadening this principle to contexts below that of the threshold of a civil war, Wright argues – in connection with assistance to a constitutional government to suppress a rebellion that is not externally supported – that international law

does not permit the use of force in the territory of another state on invitation either of the recognized or the insurgent government in times of rebellion, insurrection or civil war. Since international law recognizes the right of revolution, it cannot permit other states to intervene to prevent it.¹⁴⁷

However, those that adopt this position of strict non-interference also accept that there is an exception to it in that 'outside interference in favour of one party to the struggle permit[s] counter-intervention on behalf of the other.'¹⁴⁸ On this

143 'Syria Conflict: UK Recognises Opposition, Says William Hague', above n 137.

144 See Planning Staff of the Foreign and Commonwealth Office, 'Is Intervention Ever Justified?' (Foreign Policy Document No 148, UK Government, 1986), quoted in Geoffrey Marston (ed), 'United Kingdom Materials on International Law 1986' (1986) 57 *British Yearbook of International Law* 487, 614. Although somewhat ambiguous, in that it could be construed as possibly referring to intervention in support of rebel forces only, in the 1965 *Declaration on the Inadmissibility of Intervention* the UNGA declared that 'no State shall ... interfere in civil strife in another State': UN Doc A/RES/20/2131, para 2. See also the 1970 *Declaration on Principles of International Law Concerning Friendly Relations*, UN Doc A/Res/25/2625annex para 1 principle 3.

145 See Doswald-Beck, above n 1, 251; Gray, above n 3, 92; Derek W Bowett, 'The Interrelation of Theories of Intervention and Self-Defense' in John Norton Moore (ed), *Law and Civil War in the Modern World* (Johns Hopkins University Press, 1974) 38, 41.

146 Institut de Droit International, *The Principle of Non-Intervention in Civil Wars* (14 August 1975) <http://www.idi-iil.org/idiE/resolutionsE/1975_wies_03_en.pdf>.

147 Quinoy Wright, 'Subversive Intervention' (1960) 54 *American Journal of International Law* 521, 529.

148 Gray, above n 3, 81. See also *ibid*.

basis, given that the Assad regime would under this view arguably be being illegally provided with arms by both Iran and Russia due to the civil war that even President Assad himself has acknowledged is occurring,¹⁴⁹ this would then provide the right to other states to arm and provide non-lethal assistance to the opposition forces, which in the absence of the prior support for the government forces would be an unlawful act.

There are, however, identifiable problems with this position and, in general, in attaching a different set of rules to civil wars. First, there is a distinct lack of clarity over what constitutes a civil war for the purposes of applying these rules. An analogy could, of course, be made with the law of armed conflict so that a civil war is identifiable when control of a state's territory is divided between two or more warring parties.¹⁵⁰ Yet whether such an analogy is entirely appropriate is not altogether clear, and in any case, the level of division of control necessary for such a determination to be made is ultimately open to a large degree of subjectivity. Secondly, it is not in any case 'at all clear that the view that international law (the *jus ad bellum*) treats interventions in civil war differently from any other situation has support in State practice.'¹⁵¹ Indeed, there does not seem to be much evidence that states accept that they are legally obliged to refrain from supporting governments in a civil war situation.¹⁵² Instead, in the civil war context, '[c]ontemporary international practice is replete with instances of detachments of armed forces sent by one State to another, at the latter's request.'¹⁵³

To put this into context, while there have been concerns expressed regarding the probity of Russia and Iran in providing arms to the Assad regime, particularly given the brutality being inflicted through their use, there has been no, at least express, accusation that such provision is unlawful. If the UNSC was to impose an arms embargo upon the territory of Syria, as it did in *Resolution 1970* in

149 Hamza Hendawi, 'President Assad Acknowledges Struggle to Win Syria Civil War', *The Independent* (online), 29 August 2012 <<http://www.independent.co.uk/news/world/middle-east/president-assad-acknowledges-struggle-to-win-syria-civil-war-8092339.html>>.

150 See *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts*, opened for signature 8 June 1977, 1125 UNTS 609 (entered into force 7 December 1978), which does 'not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts': art 1(2), but instead applies to 'all armed conflicts ... which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this protocol': art 1(1) (emphasis added).

151 Akande, *Would It Be Lawful for European (or Other) States*, above n 134. See also James W Garner, 'Questions of International Law in the Spanish Civil War' (1937) 31 *American Journal of International Law* 66, 67–9.

152 See Akande, *Would It Be Lawful for European (or Other) States*, above n 134. Shaw notes that '[p]ractice, however, does suggest that many forms of aid, such as economic, technical and arms provision arrangements, to existing governments faced with civil strife, are acceptable': above n 15, 1152.

153 Dinstein, above n 124, 119.

Libya,¹⁵⁴ such provision of arms to the government would be unlawful either within or outside a civil war. Yet, in the absence of such a UN-mandated embargo there does not seem to be any suggestion that the provision of weapons is unlawful *per se*. Affirming this was the former head of the Syrian National Coalition in requesting recognition as the government of Syria specifically so that they could be provided with arms.¹⁵⁵ This request provides some contemporary support to the argument that the provision of weapons in a civil war is restricted to the forces of the government.

Dinstein has, however, argued that there is at least one circumstance where the principle of non-assistance in a civil war might have to be maintained and that is where the state has plunged into ‘chaotic turbulence, with several claimants to constitutional legality or none at all’ as it may simply not be possible to identify ‘any remnants of the central Government and determining who has rebelled against whom.’¹⁵⁶ On a practical point this is arguably correct, although does not seem to be applicable in the context of the Syria crisis. Outside such circumstances, there seems to be little *opinio juris* for a rule preventing the provision of arms to the governmental forces during a civil war or one permitting counter-intervention in support of the opposition forces in light of such prior intervention.

D Support for a ‘People’ Struggling for Self-determination

The Syrian National Coalition has been recognised as either *the*, or at the very least *a*, legitimate representative of the Syrian people.¹⁵⁷ A similar recognition was made regarding the NTC in Libya in 2011, prior to its recognition as the government of Libya.¹⁵⁸ While, as discussed above,¹⁵⁹ such recognition does not appear to be recognition of a governmental regime, it could be construed as recognition of the groups’ legitimate struggle for self-determination.¹⁶⁰ If this is the case, the question arises as to whether the groups are able to use force to achieve this aim under international law and most importantly for the purposes of this current article, whether third states are

154 See generally above Part III(A).

155 ‘Syria: France Backs Anti-Assad Coalition’, above n 136.

156 Dinstein, above n 124, 120.

157 The US has recognised the Syrian National Coalition as “‘the legitimate representative” of the Syrian people’, while the EU has merely recognised the Coalition as ‘legitimate representatives’ of the Syrian people. France, the UK and several Gulf Cooperation Council states have recognised the Coalition as ‘the sole legitimate representative’ of the Syrian people’: see ‘US Recognises Syria Opposition Coalition Says Obama’, *BBC News* (online), 12 December 2012 <<http://www.bbc.co.uk/news/world-middle-east-20690148>>; ‘Syria Conflict: UK Recognises Opposition, Says William Hague’, above n 137; ‘Syria: France Backs Anti-Assad Coalition’, above n 136.

158 See, eg, ‘Canada Recognises Libya Rebels as “Legitimate”’ *BBC News* (online), 14 June 2011 <<http://www.bbc.co.uk/news/world-us-canada-13771946>>.

159 See above Part IV(B).

160 As the 1970 *Declaration on Principles of International Law Concerning Friendly Relations* declared: ‘all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development’: UN Doc A/Res/25/2625 annex para 1 principle 5.

legally permitted to provide arms and 'non-lethal' assistance to them in the realisation of it.

During the Cold War resolutions were adopted by the UNGA in which national liberation movements were recognised as having the right to 'struggle' for self-determination.¹⁶¹ While some have questioned whether the use of this ambiguous term included the use of force,¹⁶² there nonetheless appeared to be a consensus within the UNGA that 'armed struggle' by the self-determination movements was permitted.¹⁶³ Furthermore, while the 1970 *Declaration on Principles of International Law Concerning Friendly Relations* declares that '[e]very State has the duty to refrain from any forcible action which deprives peoples ... of their right to self-determination and freedom and independence',¹⁶⁴ it further declares that '[i]n their actions against, and resistance to, ... forcible action in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and to receive support in accordance with the purposes and principles of the Charter'.¹⁶⁵ In addition, the 1972 *Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples* '[u]rges all states ... to provide moral and material assistance to all peoples struggling for their freedom and independence'.¹⁶⁶ To perhaps put this into some contemporary context, it might be argued that if the opposition forces in Syria are representative of a 'people' struggling for self-determination then they are clearly being forcibly deprived by the Assad regime of this right, with Russia and Iran also in violation of their obligations through their support for such measures. In this case the Syrian National Coalition may not only be able to forcibly resist it but are also able to seek and receive arms and non-lethal assistance in doing so.

Yet, while recognition of the opposition groups in both Libya and Syria as 'legitimate representatives' of the respective people might be viewed as recognition that they are engaged in a legitimate struggle for self-determination, the states that have provided such recognition were also not 'explicit in saying that they [were] applying a self-determination framework'.¹⁶⁷ Even if they had been, there is no objective definition of a 'people' for the purposes of this

161 See, eg, *Definition of Aggression*, GA Res 3314 (XXIX), UN GAOR, 29th sess, 2319th plen mtg, UN Doc A/RES/3314 (14 December 1974) annex art 7.

162 See, eg, Gray, above n 3, 60.

163 See, eg, *Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States*, GA Res 36/103, UN GAOR, 37th sess, 91st plen mtg, UN Doc A/RES/36/103 (9 December 1981) annex para 2(III)(b) (which was adopted 120–22–6). Gray, however, notes that 'this deliberately does not unequivocally set out any right of national liberation movements or of sympathetic states to use force': Gray, above n 3, 61. See generally Heather A Wilson, *International Law and the Use of Force by National Liberation Movements* (Clarendon Press, 1988).

164 *Declaration on Principles of International Law Concerning Friendly Relations*, UN Doc A/Res/25/2625, annex para 1 principle 5 (emphasis added).

165 Ibid.

166 *Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples*, GA Res 2908 (XXVII), UN GAOR, 2078th plen mtg, UN Doc A/RES/2908 (2 November 1972) para 8 (emphasis added).

167 Akande, *Would It Be Lawful for European (or Other) States*, above n 134.

right.¹⁶⁸ Furthermore, the elaboration of these rights and obligations were made during the decolonisation era of the 20th century, and as such, appear to be limited to national liberation movements battling against colonialism and occupation. While a revolution is clearly taking place in Syria, and one arguably took place in Libya, neither the Syrian National Coalition or NTC can be perceived as national liberation movements fighting battles to free their respective states from the grips of an external power. As such, while national liberation movements battling against colonialism and occupation had a right to 'armed struggle' in pursuing their right of self-determination, it is questionable whether 'peoples' in other contexts who are in possession of a right of self-determination similarly possess a right to engage in armed force to achieve it. There does not, it has to be said, appear to be any support for the proposition that they do. Indeed, 'the extension of the right of self-determination outside the colonial context in the breakup of the USSR, Yugoslavia and Czechoslovakia has not brought with it any state support for the use of force for this end' either by the peoples themselves or by third states through either direct or indirect means.¹⁶⁹ Consequently, there does not appear to be any 'support for the right to use force to attain self-determination outside the context of decolonization or illegal occupation,'¹⁷⁰ and as a result, it is doubtful whether arms and non-lethal assistance could be provided to the opposition forces upon the legal basis of supporting a self-determination movement.

E Indirect Unilateral Humanitarian Intervention

The underlying rationale for the provision of arms and non-lethal assistance in the Arab Spring has ostensibly been to enable opposition forces to fight brutal regimes that are suppressing human rights. In Libya the question was whether such arms and assistance could be provided under the authority provided to 'protect civilians',¹⁷¹ while in Syria the main justification advanced for the provision of non-lethal assistance was 'to help save lives',¹⁷² with the decision to commence providing arms appearing to be taken upon confirmation of evidence proving that chemical weapons have been used by the Assad regime.¹⁷³ As such, one might expect that the provision of arms and assistance would be incorporated

¹⁶⁸ Robert McCorquodale and Kristin Hausler, 'Caucuses in the Caucasus: The Application of the Right of Self-Determination' in James A Green and Christopher P M Waters (eds), *Conflict in the Caucasus: Implications for International Legal Order* (Palgrave, 2010) 26, 29–30. Both the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights* provide, in art 1(1) of each instrument, that '[a]ll peoples have the right of self-determination.' Yet, neither document goes into any further detail as to who might represent a 'people' for this purpose: *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

¹⁶⁹ Gray, above n 3, 64.

¹⁷⁰ Ibid.

¹⁷¹ See above Part III(A).

¹⁷² See above Part III(B)(1).

¹⁷³ See above Part III(B).

under a right of unilateral humanitarian intervention if such a right can be said to exist under international law.

The prohibition of the threat or use of force is found in article 2(4) of the *UN Charter*,¹⁷⁴ with the only express exceptions to this prohibition being individual and collective self-defence and action undertaken by or with the express approval of the UNSC.¹⁷⁵ While the UNSC has been involved in many forcible interventions with humanitarian aims as the underlying, if not, express motivation,¹⁷⁶ there is no express right of unilateral, as opposed to multilateral, humanitarian intervention in the *UN Charter*. This consequently draws one into an examination as to whether an implied right to intervention based upon such grounds can be located within the *UN Charter* or whether one has developed either through a reinterpretation of the *UN Charter* or through customary international law.

The stipulation in article 2(4) 'expressly prohibits the threat or use of force 'against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.' Some have thus argued for the legality of direct unilateral humanitarian intervention on the basis that such interventions do not in principle permanently infringe upon the territorial integrity or political independence of the target state and, far from being 'inconsistent with the Purposes of the United Nations', would in fact be consistent with such purposes given that these are undertaken in furtherance of the protection of human rights.¹⁷⁷ Indeed, the Preamble of the *UN Charter* is clear that one of the founding purposes of the UN is 'to reaffirm faith in fundamental human rights'. Upon this basis, the door is opened to arguments along similar lines for *indirect* humanitarian intervention, in the form of the provision of arms and non-lethal assistance. Yet the *travaux préparatoires* of this particular provision of the *UN Charter* indicates that, far from providing exceptions to the general scope of the prohibition, the particular wording included was done so as to provide particular emphasis to these facets of a state.¹⁷⁸

In addition, while a few commentators have argued that such a right exists under international law, or that such a right *should* exist, state acceptance of such a right is ambiguous at best, and certainly does not exhibit the practice and *opinio juris* necessary to modify the prohibition of the use of force in the incorporation of one. There were no incidences during the Cold War where states resorted to forcible action by invoking a legal right of humanitarian intervention, or even

174 See above n 32.

175 These exceptions are located in art 51 and in chs VII and VIII of the *UN Charter* respectively.

176 Eg, it authorised states to use all necessary means 'to establish as soon as possible a secure environment for humanitarian relief operations in Somalia' in 1992: see SC Res 794, UN SCOR, 48th sess, 3145th mtg, UN Doc S/RES/794 (3 December 1992) para 10.

177 This was discussed in Oscar Schachter, 'The Legality of Pro-Democratic Invasion' (1984) 78 *American Journal of International Law* 645, 649.

178 See A Randelzhofer, 'Article 2(4)' in Bruno Simma (ed), *The Charter of the United Nations: A Commentary* (Oxford University Press, 2nd ed, 2002) vol 1, 112.

justifying their actions upon humanitarian grounds. Instead, those interventions which arguably had a positive humanitarian outcome, in particular India's intervention in East Pakistan in 1971, Vietnam's intervention in Cambodia in 1978–9, and Tanzania's intervention in Uganda in 1979, were justified on other legal bases, most notably self-defence.¹⁷⁹ This state of affairs arguably led to the UK claiming in 1986 that 'the overwhelming majority of contemporary legal opinion comes down against the existence of a right of humanitarian intervention.'¹⁸⁰ Indeed, this was for the reasons, as noted above, that neither the *UN Charter* nor international law more generally seem to specifically incorporate such a right and that 'state practice in the past two centuries, and especially since 1945, at best provides only a handful of genuine cases of humanitarian intervention, and, on most assessments, none at all.'¹⁸¹ Ultimately, and upon the basis of the available evidence, the UK was of the opinion that 'the best case that can be made in support of humanitarian intervention is that it cannot be said to be unambiguously illegal.'¹⁸² Yet not only did the UK fail to find support for such a right, but it appeared also to argue against the possible development of one. Indeed, it claimed that

on prudential grounds ... the scope for abusing such a right argues strongly against its creation. ... the case against making humanitarian intervention an exception to the principle of non-intervention is that its doubtful benefits would be heavily outweighed by its costs in terms of respect for international law.¹⁸³

It is thus somewhat ironic that today, in the post-Cold War era, the UK has been perhaps the leading proponent amongst states for such a right. Indeed, in the two leading examples of interventions that appeared to have a humanitarian purpose during this time – that is, the establishment of the safe havens and no-fly zones in Iraq in 1991–2 and their subsequent enforcement along with the intervention by NATO in Kosovo in 1999 – only the UK (alongside Belgium in the aftermath of the latter intervention) justified its actions under a right of humanitarian intervention, and even then, it has to be said, somewhat equivocally.¹⁸⁴

179 See 'Developments Prior to Security Council Consideration' [1971] *Yearbook of the United Nations* 144, 145; Keesing's Worldwide, 'May 1979 – Continued Fighting on Border – Formation of "Cambodian National United Front" – Vietnamese Invasion of Cambodia – Fall of Phnom-Penh – "People's Revolutionary Council" formed by United Front – UN Security Council Debate – Resolution Vetoed by Soviet Union – Guerrilla Resistance by Khmer Rouge Forces – Treaties with Vietnam and Laos Signed by Revolutionary Council' [1979] *Keesing's Contemporary Archives* 29613; Keesing's Worldwide, 'Jun 1979 – Overthrow of President Amin as a Result of Combined Operations of Ugandan Exiles and Tanzania's Armed Forces – Earlier Annexation of Part of Tanzania by President Amin – Establishment of Provisional Government by Uganda National Liberation Front – Related Internal Developments' [1979] *Keesing's Contemporary Archives* 29669, 29669–73.

180 Planning Staff of the Foreign and Commonwealth Office, 'Is Intervention Ever Justified?' (Foreign Policy Document No 148, UK Government, 1986), quoted in Geoffrey Marston (ed), 'United Kingdom Materials on International Law 1986' (1986) 57 *British Yearbook of International Law* 487, 619.

181 *Ibid.*

182 *Ibid.*

183 *Ibid.*

184 Eg, Baroness Symons of Vernham Dean stated in the House of Lords in 1998 that

In addition, 'the so-called "right" of humanitarian intervention' was stated as having 'no legal basis in the United Nations Charter or in the general principles of international law' in the aftermath of the Kosovo intervention by the Group of 77 coalition of developing states.¹⁸⁵ This was a significant rejection given that this group represents the views of 132 states of the international community. Furthermore, the ICJ in the *Nicaragua* case of 1986 was also somewhat dismissive in its jurisprudence by claiming that 'the use of force could not be the appropriate method to monitor or ensure [respect for human rights].'¹⁸⁶ While this case is nearly thirty years old, the ICJ has not stated any more support for such a right or indicated that circumstances have necessitated a change in approach.

Perhaps the final nail in the coffin of a right of unilateral humanitarian intervention has emerged through the R2P concept which was advanced as the possible solution to the dilemma thrown up through the unilateral intervention witnessed in Kosovo in 1999.¹⁸⁷ While only seen as an 'emerging norm' at best,¹⁸⁸ the 'responsibility to react' element of this responsibility has not been placed in the hands of states, but has instead been very much placed with the UNSC.¹⁸⁹ Although the debate continues as to what should happen if the Council finds itself unable to act in the face of a humanitarian crisis,¹⁹⁰ as is currently the case in Syria, and in particular, *who* is to shoulder this responsibility should the Council fail to act,¹⁹¹ the possibility of states acting unilaterally has not been put

[t]here is no general doctrine of humanitarian necessity in international law. Cases have nevertheless arisen (as in northern Iraq in 1991) when, in the light of all the circumstances, a limited use of force was justifiable in support of purposes laid down by the Security Council but without the Council's express authorisation when that was the only means to avert an immediate and overwhelming humanitarian catastrophe. Such cases would in the nature of things be exceptional and would depend on an objective assessment of the factual circumstances at the time and on the terms of relevant decisions of the Security Council bearing on the situation in question.

United Kingdom, *Parliamentary Debates*, House of Lords, 16 November 1998, vol 594, col 140, quoted in Geoffrey Marston (ed), 'United Kingdom Materials on International Law 1998' (1998) 69 *British Yearbook of International Law* 433, 593 (emphasis added).

185 *Letter Dated 5 May 2000 from the Permanent Representative of Nigeria to the United Nations Addressed to the President of the General Assembly*, UN GAOR, 55th sess, Agenda Items 20(a), 31–2, 40–1, 61(b), 88, 94–5, 96(a), 96(c)–(d), 97(a)–(b), 97(d)–(e), 98, 101–5 and 110, UN Doc A/55/74 (12 May 2000) annex I [54] ('*Declaration of the South Summit*').

186 *Nicaragua* [1986] ICJ Rep 14, 134 [268].

187 Christian Henderson, 'R2P: Room for a Tertiary Responsibility?' in Vasilka Sancin and Maša Ković Dine (eds), *Responsibility to Protect in Theory and Practice* (GV Založba, 2013) 356, 356.

188 See *Follow-Up to the Outcome of the Millennium Summit*, UN GAOR, 59th sess, Agenda Item 55, UN Doc A/59/565 (2 December 2004) annex [203] ('*A More Secure World: Our Shared Responsibility – Report of the High-Level Panel on Threats, Challenges and Change*'). See also Carlo Focarelli, 'The Responsibility to Protect Doctrine and Humanitarian Intervention: Too Many Ambiguities for a Working Doctrine' (2008) 13 *Journal of Conflict & Security Law* 191, 192–3.

189 See, eg, International Commission on Intervention and State Sovereignty, 'The Responsibility to Protect' (Report, December 2001) 49–52 [6.13]–[6.27].

190 See generally Henderson, 'R2P: Room for a Tertiary Responsibility?', above n 187.

191 *Ibid.*

forward as an acceptable possibility.¹⁹² Indeed, although the UNSC arguably acted under R2P in authorising the use of force in Libya,¹⁹³ the fact that it has not taken similar action under R2P in Syria has not expressly provoked any real calls for unilateral action in its place.¹⁹⁴ Thus any supply of arms or non-lethal assistance justified upon a right of humanitarian intervention or R2P would not appear to have any contemporary legal basis.

F The Theory of Legitimate Defence

There is a final possibility which should perhaps be considered in the context of the provision of arms and non-lethal assistance to opposition groups, particularly given its connection with self-defence as the sole unilateral exception to the prohibition of use of force. Indeed, the 'theory of legitimate defence' provides that states can act in defence of individuals in another state, and as such, may have some bearing on the way in which we perceive the possibilities for states to invoke self-defence in this context.¹⁹⁵

The theory first establishes that the legal concept of 'self-defence' as used in domestic common law systems is necessarily supplemented by other provisions so as to provide for the defence of other persons while the concept of 'legitimate defence' in civil law systems is not; such defensive actions are already encompassed in the relevant provisions. These differences are then transposed into the international arena as the English version of article 51 of the *UN Charter* governing the right of self-defence utilises the concept of 'the inherent right of self-defence' while the French version employs the concept of a '*droit naturel de légitime défense*'. This semantic difference leads the authors of the theory to conclude that the substantive differences between the domestic systems regarding the scope of the right must also exist in the different versions of article 51 so that the French version of article 51 provides for the concept of the defence of others. 'The concept', the authors argue, 'supports a much broader range of permissible interventions, not just limited to individual self-defence or mutual defense arrangements. Any nation has the right to intervene when nations fall victim to illegal aggression.'¹⁹⁶ Indeed, groups of people, or more specifically 'nations', have a right of self-defence under article 51 and '[b]ecause nations have a natural right to self-defense in the face of an armed attack, it follows that others have a right to come to their defense as well.'¹⁹⁷ The authors are keen to point out that this is not the same as collective self-defence, which firmly exists in the interstate

192 Instead, outside of the UNSC perhaps the option with the greatest level of prominence seems to be regional organisations seeking ex post facto approval for actions with ostensibly humanitarian aims: International Commission on Intervention and State Sovereignty, above n 189, 54 [6.35].

193 See Henderson, 'International Measures for the Protection of Civilians', above n 10, 768–9.

194 Perhaps a rare example was US Senator John McCain's call for such action: 'US Senator John McCain Calls for Air Strikes on Syria', *BBC News* (online), 6 March 2012 <<http://www.bbc.co.uk/news/world-us-canada-17266798>>.

195 The theory of legitimate defence was advanced in George P Fletcher and Jens David Ohlin, *Defending Humanity: When Force Is Justified and Why* (Oxford University Press, 2008).

196 Ibid 76.

197 Ibid 146.

tradition of international law. Instead, the theory of legitimate defence provides for the defence of individuals or nations that exist *within* other states.

In many respects, the theory certainly adds to the debate as to the ways in which states may be able to provide arms and non-lethal assistance to opposition groups. Furthermore, it is one that keeps the debate within the terms of the *UN Charter*.¹⁹⁸ However, there are notable problems with this theory in the context of the discussion in this article. For example, the authors argue that under the right,

the world community can come to the aid of any nation who has a legitimate claim to self-defense against an armed attack. ... When a nation is not in control of its own affairs but is part of a larger state and it suffers an attack against its own interests, either from its own government or from outside forces, it has an inherent right of self-defense. And the world community has the right to intervene on its behalf through the exercise of legitimate defense.¹⁹⁹

However, the authors seem to be oblivious to the fact that the right of self-defence only arises in the context of the occurrence of an 'armed attack' or 'aggression armée' against 'a Member of the United Nations.'²⁰⁰ If a state was to provide arms or non-lethal assistance to a 'nation' it would not be intervening in defence of a 'member of the UN', a phrase which is firmly placed within the statist conception of international law. Instead, it would be intervening directly against the wishes of such a member in support of individuals based within the state's territorial confines. The proposition that an armed attack can be inflicted by a state upon its own people thus providing states with a right of defence of others is a very controversial one, and probably for this reason, not one that has been fully considered, or indeed, accepted as law.

Questions might also be posed in regard to when a state might take it upon itself to intervene in support of an opposition group under this theory. In this respect, the authors of the theory deny that the group needs to either declare itself the victim of an armed attack or request assistance, two formalities that are attached to the right of collective self-defence.²⁰¹ Indeed, the authors argue that

the reason to relax the requirement of a formal request for assistance is that the responding state is engaging in defense of others, not some contorted version of self-defense. Just as anyone on the street has the right to come to the defense of a victim of a violent attack and need not wait for a formal request, so too any member of the world community should have the right to engage in defense of others when a violent attack has occurred.²⁰²

In this sense it is argued that 'the whole point of defense of others is that *strangers* who happen upon the scene can do something about it.'²⁰³ However,

198 This is important that, as the authors argue, arguments promoting rights outside of the bounds of the *UN Charter* 'weaken the international prohibition on the use of force, which is the centerpiece of the international legal order': *ibid* 134.

199 *Ibid* 146–7.

200 *UN Charter* art 51.

201 Fletcher and Ohlin, above n 195, 70. The ICJ stated these requirements in the *Nicaragua* [1986] ICJ Rep 14, 120–1 [232]–[234].

202 Fletcher and Ohlin, above n 195, 70.

203 *Ibid* 80 (emphasis in original).

this apparent analogy with the domestic context simply does not work in the international framework. Not only would it run deep against the principles of non-intervention and non-use of force, but the possibilities for abuse where states are able to make such subjective and unilateral decisions are endless. Ultimately, given that no state has relied upon legitimate defence in any context, let alone in providing arms or non-lethal assistance to an opposition force, it is difficult to contend that this is anyhow a 'right', even to be labelled as a controversial one, under international law and thus one upon which the provision of arms and non-lethal assistance to an opposition force could be firmly based.

V CONCLUSION

While the supply of arms and non-lethal assistance was a stable feature of the Cold War, what distinguishes the incidents witnessed in the Arab Spring – and particularly in Syria – with this period was the open righteousness with which many states declared their actual or potential provision. Despite concerns regarding the identity and underlying aims of those on the receiving end, as well as the short- and long-term negative implications of such provision,²⁰⁴ the righteousness was largely based upon arguments of morality (in terms of saving lives) and strategy (in terms of bringing to an end the regime of Gaddafi in Libya and persuading the Assad regime in Syria to come to the negotiating table). But the same states also paid lip service to the necessity of their actions falling within the legal 'framework'. While in Libya action was justified under the UNSC authorisation provided, in Syria there has been a distinct lack of specificity in this respect. This leaves to the imagination exactly how such action can be justified within a framework which, as set out in Parts II and IV above, gives a diametrically opposed answer to the question of the legality of supplying arms and non-lethal assistance to opposition forces both within and outside the civil war context.

204 The identity of the opposition forces and who they ultimately represent and place allegiance to has been the main expressed concern of states in the Arab Spring. In the case of Libya, it was openly acknowledged that the acting coalition of states did not know who the rebel groups were, with some suggestions of possible links to al-Qaeda: see Praveen Swami, Nick Squires and Duncan Gardham, 'Libyan Rebel Commander Admits His Fighters Have Al-Qaeda Links', *The Telegraph* (online), 25 March 2011 <<http://www.telegraph.co.uk/news/worldnews/africaandindianocan/libya/8407047/Libyan-rebel-commander-admits-his-fighters-have-al-Qaeda-links.html>>. In Syria, the al-Nusra Front has openly expressed its allegiance to the leader of al-Qaeda: see 'Syria Crisis: Al-Nusra Pledges Allegiance to Al-Qaeda', *BBC News* (online), 10 April 2013 <<http://www.bbc.co.uk/news/world-middle-east-22095099>>. Furthermore, if the West was to arm the opposition forces in Syria, then it is possible that both Russia and Iran would consequently increase their own supply of arms to the Assad regime. This would lead to a proliferation of arms not only on the streets of Syria, but also potentially in the region more widely with the possible intervention of other states. Israel, for one, has openly said that it would not find such a situation acceptable: see Richard Spencer, 'Israeli Threat to Intervene in Syria', *The Telegraph* (online), 18 April 2013 <<http://www.telegraph.co.uk/news/worldnews/middleeast/syria/10004275/Israeli-threat-to-intervene-in-Syria.html>>.

Yet, alongside this vague reference to the international legal framework there has, in addition, been a distinct lack of general reaction – equating, perhaps, to acquiescence – regarding the legality of such action in Syria, with Russia appearing rather alone in expressly claiming its illegality. Indeed, China, who is often aligned with Russia on such issues, has remained remarkably silent. Similarly, there has been no discernible reaction from the Non-Aligned Movement.²⁰⁵ The Independent International Commission of Inquiry on the Syrian Arab Republic has urged caution and for a de-escalation in the militarisation of the conflict.²⁰⁶ This sentiment has been shared by the UN Secretary-General who restricted his condemnation to claiming that the arming of the Syrian rebels 'would not be helpful'.²⁰⁷ In addition to not sanctioning the action, the UNSC has also unsurprisingly not condemned it, while the UNGA has not passed judgment, except for calling for a political transition.²⁰⁸ Although a lack of reaction might be expected when action of a forcible nature is merely being debated, this might be expected to change upon a firm decision to proceed, for example with the decision of the US to provide arms and the statement of the Friends of Syria Group in June 2013. But these decisions and statements did not seem to generate any further, or more discernible, reaction, and certainly none that might indicate that a *jus cogens* norm was at stake.

The framework in Part II of this article suggested a difference in perception in legality, if not legal consequences, between unlawful interventions and unlawful uses of force. Yet, the real difference appears from the Syria crisis to be between direct and indirect unilateral uses of force. This, it is suggested here, is something which arguably stems from the introduction and evolution of the R2P concept.²⁰⁹ Indeed, the last unilateral humanitarian intervention of a direct forcible nature – NATO's intervention in Kosovo in 1999 – was heavily debated and commented upon, and did not pass without accusations of illegality from states, including Russia, China, India, Cuba, Ukraine and Belarus,²¹⁰ the Group of 77,²¹¹ the UN Secretary-General,²¹² and the Independent International

205 The Final Document of the 16th Summit of the Heads of State or Government of the Non-Aligned Movement held in Tehran, Iran, in August 2012 contained very little mention of the Syrian crisis. It did state, however, that '[t]he Heads of State or Government took note of the efforts of the international community to deal with the situation in Syria': Islamic Republic of Iran, '16th Summit of the Heads of State or Government of the Non-Aligned Movement – Final Document' (Working Paper, Non-Aligned Movement, 31 August 2012) 100 [364] (emphasis altered).

206 'Syria Conflict Has Reached New Levels of Brutality – UN', *BBC News* (online), 4 June 2013 <<http://www.bbc.co.uk/news/world-middle-east-22765692>>.

207 Haroon Siddique and Tom McCarthy, 'UN Secretary General Says US Arming Syria Rebels "Would Not Be Helpful" – As It Happened', *The Guardian* (online), 15 June 2013 <<http://www.guardian.co.uk/world/2013/jun/14/us-to-arm-syrian-rebels-live>>.

208 *The Situation in the Syrian Arab Republic*, GA Res 67/262, UN GAOR, 67th sess, 80th plen mtg, Agenda Item 33, UN Doc A/RES/67/262 (4 June 2013).

209 See above Part IV(E).

210 These states tabled a draft UNSC resolution which affirmed that the unilateral use of force by NATO constituted, amongst other things, a violation of art 2(4) of the *UN Charter*.

211 See *Declaration of the South Summit*, UN Doc A/55/74.

212 See Gray, above n 3, 41.

Commission on Kosovo, who concluded that the campaign was 'illegal but legitimate'.²¹³ In fact, very few of the acting states made reference to any framework of international law, let alone openly argued for the legality of the action.²¹⁴ Ultimately, there was a distinct sense from all concerned that the action was unlawful, although many perceived it nonetheless as possessing a degree of legitimacy. Despite the subsequent emergence of the R2P concept and its quest to reconcile legality with legitimacy in the launching of humanitarian action, the result of 12 years of evolution of the concept is that direct forcible humanitarian interventions remain lawful only if undertaken by or with the express consent of the UNSC.²¹⁵ Indeed, Libya can perhaps be seen as providing some practical support for this contention in that unilateral action was ruled out by Anders Fogh Rasmussen, NATO Secretary-General, in the absence of a UNSC mandate.²¹⁶

Yet, while the emergence and development of the R2P concept has thus far not changed the law, it has nonetheless appeared to have changed perceptions. In the context of direct forcible action, while there was previously an acceptance that the UNSC *could* lawfully intervene in civil strife where lives are at stake, the emergence of R2P has led to there being something of an expectation that it *should*.²¹⁷ However, the contrast in reaction by the UNSC to the Libyan and Syrian conflicts starkly highlights that, despite the law remaining as it was, the UNSC also remains a relatively unreliable and inconsistent body regardless of the arrival of R2P.

It is in this respect that the Syrian conflict may provide some tentative support for the proposition that perceptions are beginning to shift, or at least crystallise, in connection with the acceptability of unilateral *indirect* forcible actions in the R2P context, in which the conflict in Syria can be seen to be positioned.²¹⁸ Indeed, while direct unilateral forcible intervention was expressly excluded in both Libya and Syria, even by many of the potential acting states,²¹⁹

213 See generally the Independent International Commission on Kosovo, *The Kosovo Report: Conflict, International Response, Lessons Learned* (Oxford University Press, 2000).

214 See Christian Henderson, 'The Centrality of the United Nations Security Council in the Legal Regime Governing the Use of Force' in Nigel D White and Christian Henderson (eds), *Research Handbook on International Conflict and Security Law: Jus ad Bellum, Jus in Bello, and Jus post Bellum* (Edward Elgar, 2013) 120, 149.

215 See above Part IV(E).

216 Ewen MacAskill and Julian Borger, 'No-Fly Zone Plan Goes Nowhere as US, Russia and NATO Urge Caution', *The Guardian* (online), 2 March 2011 <<http://www.theguardian.com/world/2011/mar/01/libya-no-fly-zone-america>>.

217 See Michael Wood, 'The Law on the Use of Force: Current Challenges' (2007) 11 *Singapore Year Book of International Law* 1, 13.

218 Eg, in response to the heavy fighting that was witnessed in the town of Qusayr in June 2013, the UNSC stated that '[t]he members of the Security Council call upon all parties in Syria to do their utmost to protect civilians and avoid civilian casualties, recalling the primary responsibility of the Syrian Government in this regard': see Department of Public Information, United Nations, 'Security Council Press Statement on Heavy Fighting in Al-Qusayr, Syria' (Press Release, SC/11028, 7 June 2013) <<http://www.un.org/News/Press/docs/2013/sc11028.doc.htm>>.

219 Although the US has ominously stationed F-16 fighter jets and Patriot missiles in Jordan: see 'US to Keep Patriot Missiles and F-16s in Jordan', *BBC News* (online), 15 June 2013 <<http://www.bbc.co.uk/news/world-middle-east-22924078>>.

indirect forcible intervention, of a controversial nature in Libya and formally unlawful in Syria, has seemingly not been. The emboldened way in which the proponent states appeared to have asserted the legitimacy of such action in this context, even if the specific legal basis was not alluded to, is arguably explained by the shift in perception of acceptable action in light of the emergence of the R2P concept, albeit without a formal legal basis to support it. Indeed, this was certainly not witnessed in the same way during the Cold War, and it is difficult to envisage it being displayed in the context of the provision of arms to an opposition force in a state where the state authorities *are* protecting those within its borders.

While debates regarding the possibilities for action outside of the UNSC in the R2P context have been somewhat dominated by the issue of direct forcible action, given the cul-de-sac that these have thus far led to, it might be said that the time is ripe for discussions regarding the possibilities for *indirect* forcible action. Yet, if one lesson has been learnt over the past decade since the emergence of R2P, it is that abstract attempts to ignite some consensus on the issue of action do not yield any concrete and practical solutions. Indeed, perhaps highlighting this fact, and in the only joint pronouncement of states as a whole on R2P, in the 2005 World Summit Outcome document even UNSC action was to be determined on a 'case by case' basis.²²⁰ This seemingly ruled out a principled basis for action under the umbrella of R2P and provided evidence that states simply did not wish to either obligate or restrict themselves in regards to the possibility of taking action in future crises. Similarly, while some states were clearly frustrated by the Arms Trade Treaty's omission to include anything on the supply of arms to non-state actors, this omission was arguably indicative of the fact not that such action was either clearly lawful or unlawful, but that it was an issue that states did not want to prospectively bind themselves on.

For the same reason, it is unlikely that any clarification upon the legality of the provision of arms and non-lethal assistance in the R2P context will emerge in the form of a grand UNGA declaration, of the type witnessed upon several occasions during the Cold War. Instead, it is more likely that if the position is to be clarified further, this will be the result of agreement amongst states discernible from subsequent practice. Indeed, general statements of principle aside, if what has been witnessed in the Syrian crisis really does signify a clarification in the perception of acceptable behaviour in light of the emergence of R2P, and similar action and reactions are witnessed again, then this may well provide the evidence to discern a shift, or at least a carved exception, from the established legal framework governing the provision of arms and non-lethal assistance. Whether this is a positive step for international peace and security is debatable, but it would undoubtedly be a significant step forward in the evolution of the R2P concept.

220 2005 *World Summit Outcome*, GA Res 60/1, UN GAOR, 60th sess, 8th plen mtg, Agenda Items 46 and 120, UN Doc A/RES/60/1 (24 October 2005) para 139.